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THE
HISTORY, *18th Edition*
PRINCIPLES AND PRACTICE,
(ANCIENT AND MODERN,)
OF THE
LEGAL REMEDY
BY
EJECTMENT;
AND THE RESULTING ACTION FOR
MESNE PROFITS;
THE EVIDENCE (IN GENERAL) NECESSARY TO SUSTAIN AND
DEFEND THEM:
WITH AN
APPENDIX
ILLUSTRATIVE OF THE SUBJECT,

O.

BY
CHARLES RUNNINGTON,
SERJEANT AT LAW.

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PRINCIPLES AND PRACTICE

THE AMERICAN

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P R E F A C E.

THE ACTION OF EJECTMENT, considered as the creature of Westminster-Hall, for the trial of titles with more ease and less expence, than by the medium of a real action, has, for some time, been gradually moulding into a course of practice, to effectuate the end for which it was created.—It has long been an object of considerable importance in the administration of justice; and the same authority which has brought it to its present state, will, no doubt, “carry it to an higher degree of perfection, as experience happens to point out its inconveniences or defects.” With the view of illustrating, if any labours of mine could possibly illustrate, its utility, in the course of the year 1780, obtruded on the publick, a treatise on the subject. That treatise having been some time out of print, the late Mr. Justice GOULD, cordially and repeatedly, requested me to revise and enlarge it. The request, of that venerable character, (a character which will not

easily be deprived of the esteem of posterity, while learning has any reverence, or integrity any respect, among the professors of the law) had the influence of command;—a command which, at every interval of leisure, I cheerfully set myself about to obey. I am free to confess, that, on revising the former treatise, I found great room for amendment; inso-much, that though the disposition of the present work be somewhat similar to the former, yet, enlarged as it is, it may, without the imputation of vanity, be considered altogether as a new one.

I HAVE laboured to render the *practice* clear and familiar to the solicitor, and to form a useful *Vade Mecum* for the Circuit. Various as the books are, upon the *practice* of the profession, few have considered the *principles* which govern it; of course, afford but little, if any, solid information on the subject. One of them however, it must be confessed, is intitled to the warmest commendation*; inasmuch as, on the one hand, it not only connects the practice with its *principles*, in a mode clear and comprehensive, but conveys it in a language, pointed, appropriate, and correct; and on the other, has compressed the numerous cases connected with it, without, in any degree, weakening their authority.

To prevent mistake, which too often occurs, and guard against imposition, which may sometimes be

* "The Practice of the Court of King's Bench," by Mr. TIDDE
practised

practised, I have cited many of the modern decisions, somewhat more at length than otherwise I should have done; by this mean, also, every one will find the labour of research relieved, and the authority, on which he may, with confidence, rely.

THE evidence necessary to sustain and to defend the action, embraces a considerable portion of the work; which, though it cannot be expected to illustrate the whole system of evidence, necessarily connected with so extensive a branch of jurisprudence, yet sufficient, I flatter myself, is introduced, for the ordinary course of legal investigation. Such being the general view of the work, with what judgment it has been formed, and with what skill it has been executed, the profession will determine. Whatever may be my hopes, I have, not only in *this*, but in other instances, literary and professional, with some diligence, and, I trust, with some candour, endeavoured to discharge that debt, which, in the opinion of LORD BACON, every man owes to his profession.

MAY 1, 1795.

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MAY 1. 1795

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167	Wadd v. Greenhill	167	Townsend v. Ives
168	Wadd v. Greenhill	168	Townsend v. Ives
169	Wadd v. Greenhill	169	Townsend v. Ives
170	Wadd v. Greenhill	170	Townsend v. Ives
171	Wadd v. Greenhill	171	Townsend v. Ives
172	Wadd v. Greenhill	172	Townsend v. Ives
173	Wadd v. Greenhill	173	Townsend v. Ives
174	Wadd v. Greenhill	174	Townsend v. Ives
175	Wadd v. Greenhill	175	Townsend v. Ives
176	Wadd v. Greenhill	176	Townsend v. Ives
177	Wadd v. Greenhill	177	Townsend v. Ives
178	Wadd v. Greenhill	178	Townsend v. Ives
179	Wadd v. Greenhill	179	Townsend v. Ives
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181	Wadd v. Greenhill	181	Townsend v. Ives
182	Wadd v. Greenhill	182	Townsend v. Ives
183	Wadd v. Greenhill	183	Townsend v. Ives
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186	Wadd v. Greenhill	186	Townsend v. Ives
187	Wadd v. Greenhill	187	Townsend v. Ives
188	Wadd v. Greenhill	188	Townsend v. Ives
189	Wadd v. Greenhill	189	Townsend v. Ives
190	Wadd v. Greenhill	190	Townsend v. Ives
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195	Wadd v. Greenhill	195	Townsend v. Ives
196	Wadd v. Greenhill	196	Townsend v. Ives
197	Wadd v. Greenhill	197	Townsend v. Ives
198	Wadd v. Greenhill	198	Townsend v. Ives
199	Wadd v. Greenhill	199	Townsend v. Ives
200	Wadd v. Greenhill	200	Townsend v. Ives

ERRATA.

Page Line
 92 4 as for and 2
 258 6 notice for paper.
 10. 10 paper for notice.
 156 — 2. Burr. 116. for 1156.
 133 — 1. Burr. 143. for 133.
 155 2 landlord for plaintiff.
 APPENDIX, 210, between lines 8 and 9 insert XVIII.

LEGAL REMEDY

EJECTMENT.

AN Ejectment has been defined to be a mixed action, by which a lessee for years, when ousted of his possession, may recover his term and damages: *real* in respect of the lands, but *personal* in respect of damages. It has long however been deemed a *possessory* action, grounded on a *right* to the possession of the premises in question between the parties; in which action almost all titles to lands are now generally tried, and that whether the title be to an estate in fee, fee-tail, for life, or for years. In short, since the disuse of real actions, this mixed or *possessory* proceeding is become the common method of trying the title to lands or tenements. Whatsoever be the title, the remedy is, in general, by this mode of action, which has, of late, been much favoured and encouraged. Lord Mansfield said, in the case of *Chester v. Dutton* and *Another*, “the courts will go to the utmost extent

- “ extent in support of ejectments, that people may have
1. Burr. 629. “ *specific remedies for their rights ;*”—it being an “ action
- “ to try titles with more ease and dispatch and less ex-
2. Black. 941. “ pence :—the creature of Westminster-Hall, introduced
- “ within time of memory, and moulded gradually into a
- “ course of practice, by the rules of the courts. The
3. Burr. 1292. “ same authority which brought it thus far, may cer-
- “ tainly carry it to an higher degree of perfection, as ex-
- “ perience happens to point out either its conveniences
- “ or defects.—It is an ingenious fiction for the trial of
- Id.* 1294. “ titles to the possession of lands ; and, in form, it ap-
- “ pears as a trick between two to dispossess a third, by
- “ a sham suit and judgment : an artifice which would be
- “ highly criminal, unless the court converted it into a
- “ fair trial between the proper parties. The great ad-
- “ vantage of this fictitious mode is, that, being under
- “ the controul of the court, it may be so modelled as to
- “ answer, in the best manner, every end of justice and
- “ convenience. Public utility has adopted it in *lieu* of al-
- Id.* 1295, 668. “ most all *real* actions, which were embarrassed and en-
- “ tangled with a thousand niceties. But as there was good
- “ and bad in the method of real actions, the good ought
- “ to be grafted into ejectments in such manner as to
- Id.* 1294. “ avoid the bad.” Such being the general object and de-
- “ finition of the remedy by ejectment, it is of importance
- to consider,

I. *The history of the action.*

II. *For whom, and in what cases, it lies ; and, herein, the right of entry.*

III. *For what things it will lie ; and how they are to be described.*

IV. 7

IV. *The writ and process.*

V. *The ancient practice; and in what cases it is still to be adhered to.*

VI. *The modern practice; and, herein, of the declaration.*

VII. *The plea and general issue.*

VIII. *The verdict, and new trial.*

IX. *The judgment, and its incidents; and, herein, of the costs.*

X. *The writ of error.*

XI. *The execution.*

XII. *The action for mesne profits.*

I. *The history of the action.*

BY the ancient common law, neither lands nor tenements were recoverable in any personal action, the writs of entry and affize being the means usually pursued to recover the possession. Those, however, lay only against the freeholder, the estate for years being heretofore only a precarious possession; and to pursue actions against such persons was to no purpose, the term being generally determined, or determined, before any intricate title could be decided: added to which (the possessions being so very

3. Black. Com.
146. 200.

precarious), the possessors were not intrusted with defending the interest of the land; if, therefore, they were ousted by *strangers*, they could only recover damages for the loss of their possessions; and if ousted by their *lessors*, could only seek a remedy from their covenants.

It was at length thought reasonable that they should have some specific remedy against their own lessors; for, during the term, they were bound to make good the rent, and if they did not, the law afforded to the lessor an action for withholding it. As this was a benefit extended to him by a liberal construction of words (*yielding and paying*), which in themselves were no express covenant, it was but just that a similar construction should prevail for the possessor, upon the term *demise*; especially as, by making that construction, equal justice was done to both parties.

F. N. B. 220.
3. Wils. 120.
1. Black. 360.
3. Burr. 1296.

FORMERLY, it has been said, two writs of ejectment were in use, the writ of *ejectione firmæ*, and that of *quarta ejecit infra terminum*. In the former, judgment was given to recover damages only; but in the latter, it was extended to a recovery of the term itself. Be that as it may, I believe, by the old law and practice in ejectment, the plaintiff recovered only damages, the true measure of which was the mesne profits; the term was not recovered. When however it became established that the term should be recovered, then the ejectment had the effect (though by no means the form) of a real action; the proceeding was *in rem*; the thing itself, the term, only was recovered, with nominal damages, but not the mesne profits.

Some contend, that in 14. Hen. 7. the experiment was first tried, to recover the term itself in *ejectione firmæ*, in

the king's bench; which afterwards (17. H. 8.) took place also in the common pleas; and though from this time it became the form of trying controverted titles, yet many of the judges preferred the common action of trespass, conceiving that by the medium of pleading, the title was more precisely stated, and all surprise effectually prevented. Whether the experiment originated in the time of Henry the seventh or that of his successor, certain it is, that the reign of Henry the seventh gave birth to terms of long duration; and as the lessee could not then legally recover the land itself, he used, when molested, to prosecute a suit in equity against the lessor for a specific performance; and against strangers, for perpetual injunctions, to quiet the possession. Litigations so tedious and expensive, probably, induced the courts of law to extend the effect of the *ejectione firmæ*. The mere recovery of pecuniary damages was manifestly inadequate to the injury; but by recovery of the term, and of course of the possession, the lessee obtained as specific a remedy as the justice of his case required.

2. Black. Com. 11.

It is however a question which has been much agitated, whether the term was recoverable in ejectment anterior to the reign of Henry the seventh. The authorities on either side are so numerous and respectable, that it may be deemed impertinent to obtrude an opinion on the subject. Mr. Justice Blackstone conceived, that the method of recovering the term in ejectment, was settled as early as the reign of Edward the fourth; and in support of this opinion has adduced an authority, precisely in point*. To

3. Black. Com. 201.
Post. but see 3. Will. 120.

* 7. E. 4. 6. Per Fairfax: *si homo post ejectionem firmæ, de placito recoversa son terme qui est arreare, si bign come in quare ejectio infra terminum; et, si nul soit arreare, donques tout in damages.* (Bro. Abr. Quare ejecit infra terminum, 6.)

this may be added, that the ejectment was NEVER laid with a *continuando*; consequently, the plaintiff could not recover damages for the mesne profits. Hence it may be inferred, that the term was recoverable in ejectment, even prior to the reign of Henry the seventh; otherwise, the plaintiff not recovering damages, the action must have been nugatory: and as long terms have, for a considerable time, been attended with beneficial purposes, it may be permitted to say, that the most liberal construction should be interposed to support, and every possible assistance afforded to, the intention of the parties creating them. Such were the sentiments of the court in the case of

1. Burr. 282. *Plowden and Cartwright*. In which case, *Edward Plowden* being seised in fee, demised, on 5th of October 1676, by deed (*viz.* by indenture of lease between him and *Elizabeth Cartwright* only), to *Elizabeth Cartwright* for 99 years, if she should so long live, and after her death, if she should happen to die within the term, or other end or determination of the term, the remainder thereof to *Rowland Cartwright*, her eldest son (then under age), for and during the residue of the term from thence ensuing and fully to be complete and ended; yielding and paying &c. and doing suit at a mill, &c. with a penalty for every time that she or *Rowland* should grind at another mill, and paying a heriot on the death of either. And it was covenanted that both of them should repair, &c. and the lessor on his part covenanted, that both should quietly enjoy, &c.

ELIZABETH CARTWRIGHT entered, was possessed and died on the 4th of September 1694. Whereupon *Rowland Cartwright* entered, and was possessed till he died on 5th November 1753.

EXTRACTMENT.

THE lessor of the plaintiff was heir at law to *Edmund Snowden* the lessor. The defendant was the personal representative of *Rowland Cartwright*.

THE question was, whether the term existed, i. e. whether it continued beyond the life of *Elizabeth Cartwright*? For if the term did not continue beyond the life of *Elizabeth Cartwright*, then the lessor of the plaintiff had a title to recover. If it did, then the defendant had title as representative of *Rowland Cartwright*.

IT was argued for the plaintiff, that the term expired on the death of *Elizabeth*, the limitation over being void. The following authorities were cited, *Tr. 8. Eliz. Dyer* 153. b. pl. 102. *Cro. Eliz. 216. Tr. 32. Eliz. Green v. Edwards. 1. Co. Rep. 153. b. Rector of Chedington's Case. Co. Lit. 45. b. Sheppard's Touchstone, 274.*

LORD MANSFIELD.—The distinction cited from *Sheppard* (which he takes from the *Rector of Chedington's Case*) makes no difference, if the word "term" may signify the time, as well as the interest; for then it becomes merely a question of construction, "which sense the word ought to be understood in." So Anderson argued in *Green v. Edwards*. He said, "if the wife had been a party to the deed, *durante termino* should not be taken for the interest, but for the time." He said, "the word term cannot be taken to mean interest, which the husband had for 90 years" (for if so understood, by his death the whole would be determined, and the wife could have nothing, and therefore it could not be used in that sense; but the lessor, by the word "term," must mean the time of 90 years; and the word "term" signifies as well the time, or space of 90 years, as the interest).

THE other judges held the limitation by way of remainder

THE LEGAL REMEDY

to be void, from the uncertainty of commencement; and denied that the wife, being a party, would have made any alteration.

THE old cases held, "that there could be no remainder or substitution of a term after an estate for life, by deed or will." It was a mere possibility. It was void from the uncertainty of commencement. There was no particular estate. The gift of a term (like any other chattel) for an hour, was good for ever.

THE objections were subtle and artificial.

WHEN long and beneficial terms came in use, the convenience of families required, that they might be settled upon a child after the death of a parent. Such limitations were soon allowed to be created by will; and the old objections were removed by changing the name from "remainders" to "executory devises." The same reason required that such limitations might be created by deed; as for instance, marriage settlements, to answer the agreement of parties, and exigencies of families. Therefore to avoid the literal authority of old cases, an ingenious distinction was invented: a remainder might be limited for the residue of the years, but not for the residue of the term.

Now in this case, upon the true construction of the lease, I am clearly of opinion, "that the land is demised to the son for so many of 90 years as should be unexpired at the death of his mother." There are many maxims of law, that deeds, especially such "as execute mutual agreements for valuable consideration, should be construed liberally, *ut res magis valeat*, according to the intent;" which ought always to prevail, unless it be contrary to law.

THE

BY EJECTMENT.

THE passage from Coke Littleton 45, defines the word "term" to signify, in understanding of law, "not only the limits and limitation of time, but also the estate and interest which passes for that time."

IF in this lease the word be taken in the latter sense, the widow can only have it for so many of 99 years as she should live, and the son have nothing afterwards.

BUT it is manifest that an interest was understood to continue after her death, to be enjoyed by her son.

FROM the course of nature it could not be supposed that she would outlive the 99 years. Rowland is to pay a penalty for grinding at another mill. He is to pay a heriot on the death of his mother. He is to repair. The lessor covenants "that Rowland shall quietly enjoy," i. e. for so many years as should not be run at the death of his mother.

THE first sense of the word makes every thing consistent and effectual. The second sense destroys one half of the lease, as repugnant and contradictory to the other. There ought to be no doubt, therefore, in which sense the word should be understood.

No stress has been laid upon the only objection which weighed with Anderson, so long ago as the 33d of Elizabeth, viz. "that Rowland was no party to the lease." And rightly. The reason why he was no party, appears from the lease. He was then an infant. The mother contracts, and procures this limitation for him. A grant may be made to a person by a deed to which he is no party. Rowland accepted and actually enjoyed after his mother's death, from the 4th of September 1694, to his own

own death, the 5th of November 1753. The lease was so intelligible to every unlearned eye, that nobody doubted of his title for 60 years.

LIMITATION of terms are now of general use. Their bounds are settled. The rules concerning them are certain and established. When they came to be allowed by will, or declaration of trust, the substantial reason was the same for allowing them by deed. A strained construction should not be made to overturn the lawful intent of the parties. It was lawful to secure this lease for the benefit of the mother, during her life, and afterwards, by way of provision for her son. All the parties undoubtedly intended it. The covenant here, "that *Rowland* should enjoy from the death of his mother for the residue of "99 years," is sufficiently certain, and might of itself amount to a lease.

MR. JUSTICE DENISON.—This must be taken that she should hold it for so much of the term of years as she should live, and *Rowland* during the remainder.

THE intention of the deed is obvious, and it certainly shews (upon the whole tenor of it) that the intention of the parties was, "that both should enjoy during the "whole term, and number of years." And if we can support the intention, by any construction, we will do it.

MR. JUSTICE FOSTER was clear the intention was, that both should enjoy during the whole term and number of years; viz. *Elizabeth* for so long of it as she should live, and *Rowland* during the remainder. All the circumstances shew this; and reserving a heriot upon the death of *Rowland*, proves the intention to have been, "that the term should continue to *Rowland* after the death

death of his mother." And the covenants all along run, "that Rowland shall quietly enjoy."

So in *Bendale v. Summerfet*, in which case Benjamin *Burr*. 2602. *Bendale*, being possessed of a term for 99 years, if he or his daughter *Betty* or *John Bendale* should so long live, devised the premises granted by such lease as follows: viz. "Item, I give to my daughter *Mary*, after the decease of my daughter *Betty*, my house, &c. during the life of *John Bendale*." *Betty* was daughter by a former wife; *Mary*, by the defendant *Mary Bendale*, now his widow. *Summerfet* was the tenant. The principal question was, "whether *Betty* was intitled to recover any, and what part, of the premises, against the defendants, or either of them?"

MR. GOULD, for the plaintiff, argued, that *Betty* was intitled to the whole for life by implication.

MR. ASHHURST, *contra*, argued, that no such intention of a life-estate could take place in a chattel interest; and cited *Moore* 635, *Rayman v. Gold*, and *Gro. Jac.* 74. *Horton and Horton*.

Two judges only were present, Mr. Justice WILLES and Mr. Justice BLACKSTONE. They both held, that *Betty* took an estate for life by implication, and that a strong probable implication was sufficient; it need not to be a necessary implication. Mr. Justice Willes spoke slightly of the case in *Moore*, and Mr. Justice Blackstone still more so of the case of *Horton v. Horton*, which, he observed, was not determined, and was only on a collateral point. He added, that in these days a term may be devised for life, by construction of the intent of the testator.

To

To return. The remedy by ejectment being introduced as before stated, the first improvement made in it was that of setting up a casual ejector; an improvement which *Keeling* conceived commenced about the time of the Troubles, though in truth it was a much older practice. Hence it became usual for those who had a right of entry into lands, to seal leases thereon, and then the person who next entered on the freehold was deemed an ejector.

THE convenience which arose from this method was, that the title could be tried *toties quoties*; whereas if the plaintiff was barred in an *affixe*, he was put to his *writ of right*. The remedy being grossly abused, applications were frequently made to the court of chancery (after three or four ejectments) to establish the prevailing title, by a bill of peace; yet that court denied its interposition, because every termor may have an ejectment, and every new ejectment supposes a new demise; and the costs were a recompence for the trouble and expence to which the possessor had been put. But where the suit begins in chancery for relief, touching pretended incumbrances on the title of lands, and that court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled, to the satisfaction of the court, it will order a perpetual injunction against the defendant; because the suit was first attached in that court, and never began at law; and when such precedent incumbrances appear to be fraudulent and inequitable against the possessor, it is within the power of the court to relieve against them.

THE method of proceeding however against a casual ejector, became the mean of turning any one out of possession; because such a plaintiff could recover his term with-

without any notice to the tenant in possession; for in its
 form an ejectment has, not inaptly, been considered as a
 trick between two to dispossess a third, by a sham suit and
 sham judgment. An artifice, as before observed, of
 such a description would be highly criminal, unless the
 court converted it into a fair trial with the proper party.
 The controul therefore which the court had over the
 judgment against the casual ejector, enabled them to put
 any terms upon the plaintiff which were just. They
 could not permit men to be deprived of their posses-
 sions without an opportunity of defending them. To
 effect which purpose they interposed their authority, by
 establishing a rule, that no plaintiff should proceed in
 ejectment against such a casual and titular ejector, with-
 out delivering a declaration to the tenant in possession,
 and making him an ejector and proper defendant, if he
 pleased.

Styl. 368.
 Sid. 24.
 Lil. Abr. 497.
 1. Blac. 360.
 3. Burr. 1294.

This was a becoming interposition, and within the F. N. B. 489.
 power of the court to form; otherwise the court would
 have been made instrumental in doing an injury to a
 third person. A declaration might have been delivered
 to a stranger, a feint defence made; verdict, judgment, and
 execution obtained, without the tenant having any no-
 tice of either. And though it cannot be doubted that
 such actions were originally brought against the real
 ejectors, who were actually in possession, yet because any
 person who came upon the land, *animo possidendi*, was
 equally an ejector with him who was the real occupant,
 the action, in strictness of law, might have been brought
 against him; but because this, as has been said, turned to
 the injury of the occupier, the rule was made, that he
 should have notice of it: the courts, therefore, would not
 give judgment in ejectment, unless an affidavit was made
 that the tenant in possession was served with a copy of
 the declaration.

THE antient practice was, that leases, to try the title, should be actually sealed and delivered; otherwise the plaintiff could maintain no title to the term: the leases were also to be sealed on the land itself, it being *maintenance* in any one who was out of possession, to convey to another. Therefore, though in relation to the quickness of the remedy, the *affize* had the advantage, because in that action none of this preparation was previously required (for the writ of *affize* came down to the affizes, the jury was there warned, the cause tryed, and judgment given); yet the method of proceeding in ejectment, from the convenience of repeated trial, notwithstanding the previous preparation, was generally preferred.

Styl. 368.

Sid. 24.

Lil. Abr. 497.

1. Black. 360.

2. Burr. 1294.

1. Burr. 301.

THUS the law stood till the time of Chief Justice *Rolle*, who invented the rule now in use; which is, that if the defendant appears in the room of the casual ejector, he shall enter into a rule to confess *lease*, *entry*, and *ouster*, and insist upon the *title* only. For when the tenant in possession requested to be admitted defendant, the court was enabled to subjoin equitable conditions to its consent; and therefore obliged *him* to admit the fiction, and try the cause upon its merits. The rule was, "wisely established" for attaining justice with ease, certainty, and dispatch; because, when the plaintiff had made his lease upon the land, any third person who came thereon, *animo possidendi*, was in strictness of law an ejector: when any other ejector, therefore, was placed in his stead, it was but reasonable that the court should impose terms upon *him*; namely, that he should not stand on the proof of the *demise*, the *actual entry*, or the *ouster*; which were no other than mere forms, to bring the title in question; and it was not fit that the plaintiff should be nonsuited for want of proving the formal demise set forth in the declaration, when the casual ejector might have let judgment pass by default.

In

in truth, the meaning of confessing *lease, entry, and ouster*, is to bring the matter to the mere question of the plaintiff's possessory title: and as the obvious end of the rule is to "*do justice*," the court is astute, to see that end substantially attained: though previous to stat. 11. Geo. 2. Black. 360. it would not compel the tenant to defend, notwithstanding his landlord had offered to indemnify him.

3. Burr. 1897.

Black. 360.

I. *For whom, and in what cases, an ejectment lies; and, wherein, of the right of entry.*

THOUGH it be true that the action of ejectment has been long considered with the greatest liberality, and with the utmost latitude, "so as to answer in the best manner every end of justice and convenience," yet there is one principle which must ever be attended to; namely, that the plaintiff cannot recover but upon the strength of his own title," and cannot, of course, found his claim upon the weakness of the defendant's. For *possession* gives the defendant a right against every man who cannot shew a good title: the party therefore who would *change* the possession, must *first* establish a legal title to it.

4. Burr. 2487.

5. T. Rep. 110.

In short, the plaintiff must recover on a *legal* title; a principle which has received additional authority from the determination of the case of *Hodsdon and Staple*. In that case the declaration consisted of three counts, on three different demises. On the trial, a special verdict was found, stating (among other facts), that on 23d August 1758, *Richard Staple*, deceased, was seised of the premises in tail general, subject to a term of 99 years, outstanding in

1. T. Rep. 614.

in *A. Culver*, in trust for securing four several life-annuities to *Sarah Dixie*, *Joseph Cox*, *Mary Curwen*, and *Mary Day*; which term was determinable on the death of the survivor of the annuitants, and, subject to the annuities, was limited, in trust, to attend the inheritance; the reversion being vested in *Catherine Culver*, who afterwards married *James Hibbins*, and on 7th April 1759 died, without issue, in the life-time of her husband and of the said *Richard Staple*; leaving *Mary Brazier* (who afterwards died in the life-time of *Richard Staple*) and *Richard Hodsdon*, the lessor of the plaintiff, her coheirs. On the 9th of October 1768, *Richard Staple* died without issue, leaving only one of the annuitants, *Sarah Dixie*, surviving him. On his death, *James Hibbins* entered, claiming the premises under an agreement and will of his wife, subject to the annuity to *Sarah Dixie*. On the 7th of October 1777, *James Hibbins* died, having devised the premises to *James Lloyd*. After his death *Lloyd* entered, claiming title, subject to the annuity. On the 14th of November 1786, *Sarah Dixie* died, and the term of 99 years determined. *Richard Staple*, *James Hibbins*, and *James Lloyd*, regularly paid the annuity; and the trust of the term was satisfied at the time of the death of *Sarah Dixie*. The special verdict then stated, that *Richard Hodsdon*, after the death of *Richard Staple*, to wit, on the 9th of October 1768, as heir of *Catherine Culver*, claiming title to the premises, subject to the annuity payable to *Sarah Dixie*, entered and ejected *James Hibbins*, and was seised of the premises; and being so seised, demised to the plaintiff as mentioned in the first count; by virtue whereof the plaintiff entered, and was possessed, till the defendant, as servant of *James Hibbins*, ejected him. That the said *Richard Hodsdon*, after the deaths of *Staple* and *Hibbins*, to wit, on the 5th of November 1777, mentioned in the second count, entered and ejected *Lloyd*,

was

as seised subject to the annuity, and demised to the plaintiff, who entered, and was possessed till the defendant, servant of *Lloyd*, ejected him. That *Hodsdon*, after the death of *Staple* and *Hibbins*, and after the determination of the trust term, to wit, on the 12th of November 1787, entered and ejected *Lloyd*, was seised and demised to the plaintiff, who entered and was possessed, till the defendant, servant to *Lloyd*, ejected him.

THOUGH the plaintiff was legally entitled to recover, yet a material question arose, namely, on which of the counts judgment should be given in his favour; in the consideration of which, it became important to attend to the different dates of the demises, as stated in the different counts of the declaration. The first demise was laid on the 10th of October 1768, being the day after the death of *Richard Staple*, the tenant in tail; upon whose death the reversion which had been vested in Mrs. *Culver* the testatrix, fell into possession, subject to the remaining annuity to Mrs. *Dixie*. The second was on 16th November 1777, a short time after the death of *Hibbins*, so as to be adapted to the title of the lessor of the plaintiff, in case *H.* should be thought entitled to an estate for life, and the term for securing the annuities not be deemed a bar. The third was on 12th November 1787, subsequent to the death of the last annuitant, and the determination of the term.—LORD KENYON, as to this question, said—We must remember that we are in a court of law. I extremely approve of what was said by Lord Mansfield in the case of *Lade v. Halford and another*,^{3. Burr. 147.} that he would not suffer a plaintiff in ejectment to be^{2. Black. 458.} consulted, by a term outstanding in his own trustee; or^{Bul. Ni. Pai. 110.} a satisfied term set up by a mortgagor against a mortgagee, that would direct the jury to presume a surrender: and when a surrender is presumed, there is an end of the legal

title created by the term. But here the facts of the case preclude any such presumption. There was an existing term at the several times of the two first demises laid in this declaration, and a considerable benefit was to be derived out of it: the last annuitant did not die till after the time of the second demise; therefore there is no reason to presume that the trustees had surrendered; and they would have been personally liable if they had. Supposing two ejectments had been brought at the same time, before the death of the last annuitant, the one by the trustees of the term, and the other by the present lessor of the plaintiff; the judge could not have directed the jury to find for both; but the trustees must have recovered, for they would have shewn a legal title. The jurisdiction of this court, in ejectment, is confined to legal titles, taking care that they do not intrude on the rules of law, nor discuss equitable titles. In *real* actions there is no doubt but that the party must state a legal title on the record; therefore it would be absurd that, respecting the manor of *Dale*, on a special verdict in *formedon*, the decision must necessarily be given according to the strict legal title; and that respecting the manor of *Sale*, on a special verdict in ejectment, there must be a contrary judgment. In this case, it is impossible to suppose there was a surrender of the term, or that it was satisfied, because the verdict finds the contrary fact. Therefore I am of opinion that judgment must be given only on the *last* count in the declaration after the death of the last annuitant.

JUSTICE ASHHURST.—I think judgment must be given on the *third* count only, because, during the existence of the term, the heir at law was not entitled to recover.

JUSTICE BULLER.—I am sorry to be under the necessity of differing from the opinion which has been given

given. It is a question of the most serious importance to the publick in general, whether that shall still be considered as law, which has undoubtedly been received as such for THIRTY YEARS PAST; or whether in all cases, as between the trustee and *cestui que trust*, or between the person entitled to the profits of the estate and him who is entitled to certain incumbrances on it, we must abide by the strict letter of the law, and say that, if there be any legal outstanding term, the lessor of the plaintiff shall not recover. In the first place, the case of *Bristow v. Pegge* Post. p. goes DIRECTLY to this point. In that case there were outstanding incumbrances; but as neither party affected to disturb, but admitted them, and as the trustees did not assert their title, the court would not permit the term, which was created for securing those incumbrances, to be set up to nonsuit the plaintiff. Suppose the estate in this case had been of the annual value of one thousand pounds, and the charge upon it had only been twenty pounds *per annum*, which was to be raised by a term; the heir at law would be entitled to have the management of the estate, to improve it, and to have all the profits except that charge; and if he did not intend to disturb that charge, I think the term ought not to be set up against him. For why should he be deprived of *that* to which he is entitled? This case, in its consequences, will go a great way to overturn *that* which has been considered as settled law, in a VARIETY OF CASES; where it has been held, that though the immediate possession may belong to some other person, yet provided the lessor of the plaintiff claims under the same title with the defendant, and acknowledges that the person who made the defendant's lease had a right to make it, and does not mean to disturb it, but is only desirous of being put into the receipt of the rents and profits of the estate, the ejectment may be maintained: otherwise, where the title is disputed between the heir at law and the

devisee, and there is a lease for twenty-one years in existence, neither of them could get into possession. But all these cases must fall to the ground, if it were sufficient to find out some term outstanding in a third person, and set it up as a bar to a recovery in ejectment. Again, in the case of a mortgage, shall a mortgagee be compelled to take possession, whether he will or not? It is contrary to the intention of the parties. He only takes the legal estate as a security; if it were otherwise, no person would lend his money upon such terms. A mortgagee would say, that he would have nothing to do with the management of the estate; and if he is unwilling to take the estate, shall it be competent to a third person to compel him? So where portions for younger children are to be raised, if they who are probably at a distance from the spot, are content that the eldest son shall have the estate, shall they, or their trustees, be compelled to take possession, and hold it against the head of the family? Very serious mischiefs will follow from such a determination. The question then is, whether we are going too far in a court of law, in preventing the legal title being set up as a bar to a recovery in ejectment in such cases? If we are, we must determine that a court of law is totally incapable of examining a question of *trust*, and indeed of deciding whether it be a trust or not: but if we are to do that, we must overturn every case upon the subject, from the time of Littleton down to the present hour. Littleton says, the *cestui que use* shall serve in assizes and other inquests, and this by the common law: for that the law wills that the feoffors, and their heirs, ought to occupy and take the profits, as if the lands were their own, without interruption of the feoffees. In that instance, courts of law are bound to enter into the question of trust, and say what effect it shall have. On looking into the statute 27. Hen. 8. c. 10. it seems strange that any doubt should

Sect. 464.

ever

er have been made concerning the true construction of

Not that I mean to overturn any of the cases which have been determined on the distinction between uses and trusts, as to the limitations of real estates. They have been decided; and, for the sake of certainty, must be adhered to. For the same reason I think that what has been considered as *settled law for THIRTY YEARS PAST*, ought not now to be departed from. But when the statute said, that all uses and trusts should be executed, it seems strange that any distinction should have been afterwards made, even in a court of law. It was not, perhaps, much to the credit of the times, that such distinction was ever made: and, as Lord Hardwicke said, this act of parliament, which was passed with the utmost deliberation, by this instruction had no other effect than to add three words to a conveyance. That cannot now be unsettled. But the question in the present case is, whether, AGAINST COMMON SENSE, we shall overturn all the cases which have been determined upon ejectments? In my opinion, there is a substantial difference between ejectments and real actions: the reasoning on one is not applicable to the other. The actions are *diverso intuitu*, and are not brought for the same purposes, or for the same interests: therefore it is true that a party may be entitled to recover in an ejectment, who is not entitled to recover in a real action. A real action can only be brought for the freehold; whereas an ejectment may be brought for a term of years, for which a real action will not lie. An ejectment is a *fiction* remedy: and has always been so modelled as to be best adapted to the administration of justice, and to ease parties in the recovery of their rights. It has been extended to the cases I have mentioned, and to cases similar to the present, where, though there has been an outstanding term, yet the plaintiff undertaking not to disturb the incumbrances, the defendant has not been per-

mitted to set it up against him. Therefore I am of opinion that judgment should be entered on the *second* count of the declaration.

JUSTICE GROSE.—I agree with my LORD CHIEF JUSTICE and my brother ASHHURST. I am well aware that some bad consequences may follow from recognising in a court of law, the doctrine which we are now considering: but the legislature must interfere and remedy that. We are sitting in a court of law, and are bound to give a legal decision. The owner of the estate raised a term for 99 years, and said that, for particular purposes, the trustees should have possession of the estate. Then if the trustees are in possession, no person can turn them out till the purposes of the trust are answered. The purpose of raising the term was, that the trustees should have it in their power to raise the annuities. Suppose them out of possession, the trustees may say it was the will of the donor that they should have the possession for those purposes. To determine therefore that, if *in* possession they shall not retain it, or shall not recover it if out of possession, would be counteracting the will of the person who created the term, taking the estate out of the possession of trustees, and putting it into the hands of persons different from those he intended. It is true, that the purposes for which such a term is created may be trifling, when compared with the rest of the estate; but we cannot take that into consideration. Therefore, on the broad ground that we have no right to change the possession, and take it from him, for whom the owner intended it, I am of opinion that judgment is to be entered for the plaintiff on the *third* count only.

So the trustee of a term, for the benefit of creditors, not having notice of an agreement for a lease made previously

previous to the grant of the term, has been permitted to maintain an ejectment against the tenant in possession, under the agreement. This seems to have been determined in *Estwick and Way* (a case which I shall state 1. T. Rep. 733. hereafter), on the ground that the title of the tenant, being only a doubtful equity, could not be set up against the legal title of the trustee.

So in the case of *Eberall and others v. Lowe and others*, it seems to have been determined, that if an 1. H. Black, 447. equitable tenant in tail grant a lease for a long term, under suspicious circumstances of fraud or imposition, it will not prevent trustees, in whom the legal estate is vested, from recovering in ejectment against the lessee. And in conformity with the principle laid down, the tenant against whom his landlord had brought an ejectment, was deemed competent to shew that the title Syburn v. Slade, 4. T. Rep. 682. of the latter had expired; consequently, that he had no legal right to turn him out of possession.

By the modern practice, the defendant is obliged, by rule of court, to confess lease, entry, and ouster, yet that rule was only designed to expedite the trial of the plaintiff's right, and not to give him a right which he had not before. Hence, it must appear that the plaintiff had actually the possession, and was ousted thereof by the defendant; for the ejectment is an action of *trespass* in its nature, and is said to have been committed *vi et armis*; it must therefore be done to the person himself complaining, and not to another who had the plaintiff's possession, though his title may be affected by the ouster. For it would be absurd to state that the defendant, *vi et armis*, ejected the plaintiff, when it appears, by his own shewing, that he had not the actual possession, but that it was, at the time of the ouster, in another. Therefore, if *A*, lessee

1. Roll. Rep. 3. for years, make a lease to *B.* at will, and *B.* is ejected, *A.* cannot sustain this action, upon that ouster; because, though the possession of *B.* was, in law, the possession of *A.* yet the trespass, *vi et armis*, which is complained of, must be against the actual possession; which was in *B.* But it seems in this case, that *B.* (though only tenant at will) may make a lease to punish the trespass and ejectment; otherwise there would be an injury done, and no one competent to redress it.

Id.

So if *A.* be lessee for years, remainder to *B.* for years; *A.* is ejected, and then his term expires: *B.* shall not have an ejectment on the ouster of *A.* because the possession was not actually in him, and he cannot complain of a trespass done to another.

T. Raym. 463. So (as said in the case of *Wedgwood v. Bailey*), if the heir bring an ejectment, and, pending the suit, his ancestor dies, yet he shall not recover. A plaintiff must recover according to the right which he had at the time of the action brought; and, during the life of the ancestor, the ouster was done to him only, who alone was competent to commence the action. One man cannot be permitted to sue for an injury done to another. So the plaintiff cannot recover against his own covenant: and a licence to inhabit amounts to a lease.

1. Burr. 119.

4. Burr. 2208.

3. Bac. Abr. 419.

In construing agreements which affect the right of possession, the court takes the whole case into consideration; and, if possible, so expound the contract, as to give effect to the intention of the parties; for intention alone, in the construction of a demise, should determine who is legally intitled to the possession. In the case of *Fry v. Philips*, one Jones granted a lease for 99 years, if three persons should so long live.

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the executrix of the grantee assigned to one *Peninton*, by indorsement on the lease, in these words: "I assign all my title, &c. to *Mr. Thomas Peninton*, for six guineas:" which writing was neither sealed, delivered, or stamped. *Peninton* entered, and, exactly in the same manner, assigned to one *Fry*; who entered and was possessed; but in 1756 gave up the possession. The executrix of the grantee was then dead. Her executor had never entered, or done any act of ownership; but in 1770, he regularly assigned to *Fry*; at that time, however, *Philips* was in possession, under a grant from *Jones*, made by him on *Fry* giving up the possession. The question for the opinion of the court was, "whether any thing passed to *Fry* by the last assignment made to him by the executor of the executrix of the grantee; which executor himself never was in possession?" which question the court did not determine; because, upon the whole of the case, *Fry* had a right. LORD MANSFIELD told the counsel, that a point had occurred to the court which had not been mentioned in the argument. If the indorsement by the executrix carried a legal interest in the term, to *Peninton*, from *Elizabeth French*, and *Peninton's* indorsement to *Fry* had a like effect, then *Fry* had the whole lease in him. And by the statute of Frauds, 29. Car. 2. c. 3. s. 3. it may be assigned by a note in writing. And such a note in writing need not be either sealed, *Post. p.* delivered, or stamped, as a deed must. And his lordship mentioned a case in the common pleas, Trinity Term 1755, between *Farmer and Rogers*, in which it was resolved, "that by the statute of Frauds and Perjuries, a lease for any term of years may be created by writing without deed, and that the same may be surrendered by deed, or note in writing. And the Court held, there was no occasion for any stamp-duty upon the
" note

3. Will. 25,
and 49. S. P.

"note or indorsement, it not being a deed (a)." So in the present case, the legal interest in this term might be assigned by a note in writing.

MR. JUSTICE ASTON was of the same opinion. *Elizabeth French*, by writing under her hand, indorsed on the back of the indenture, assigned to *Peninton*. This writing was neither sealed, delivered, nor stamped. *Peninton* entered, and then assigned in the same manner to *Fry*. The executor of *Elizabeth French* had nothing to convey.

LORD MANSFIELD.—The court must take the whole of what is stated in the case: and upon the whole of the case the plaintiff has a right.

Cowp. 473.

So, in *Yea v. Bucknell*, the plaintiff had a verdict, subject to the opinion of the court, on a case stating that on 13th March 1758, *Sir William Yea*, by an unstamped agreement, in writing, articulated to grant a lease to the defendant for twenty-one years, from Lady-day 1758, at the yearly rent of £.220. The defendant had continued in possession of the premises, and paid the rent, according to the agreement; but no lease was ever granted by the lessor of the plaintiff, or demanded by the defendant. On the 13th of September 1775, notice in writing was given by the lessor of the plaintiff, "to quit at Lady-day 1776." For the plaintiff it was contended, that the agreement was tantamount to a lease; and if so, void for want of a stamp, and could not, therefore, be given in evidence; and if not a lease, could not entitle the defendant to keep possession against the landlord.

(a) But *qu.* if it should not now be stamped, under 23, Geo. 3. c. 58.

ORD MANSFIELD. The point is, whether this be a lease? Supposing it to be a lease, what would it avail the revenue, if a court of law says it is a lease, and therefore ought to be stamped, and a court of equity says it is an agreement, and shall be read in evidence as such, which it would not be, if it were a lease and void within the stamp acts? But it is an agreement for a lease for 21 years, and the defendant has been in possession eighteen of them. Then the lessor of the plaintiff gives notice to quit, and brings an ejectment. He has agreed, for a valuable consideration, not to give notice: shall he then give notice? There might be circumstances perhaps which would let him in to maintain an ejectment. For instance, if he had tendered a lease, and the defendant had refused to execute it, whereby the plaintiff had incurred a loss. But there is no such circumstance; and if the court were to say this ejectment ought to prevail, it would merely be for the sake of giving the court of chancery an opportunity to undo all again. If the lessor of the plaintiff should recover at law, equity would immediately set it right, and he would be obliged to pay the costs of both suits.

An agreement
must now be
stamped.
See 23. Geo. 3.
c. 58.

THE above case, however, has since been doubted, namely, in that of *Sir James Lowther v. Lady Andover*. The rule certainly does not extend to the case of a purchaser.

1. Bro. Rep. in
Canc. 397.
2. T. Rep. 744.

IN *Baxter v. Browne*, the plaintiff had a verdict, subject to the following case: On the 28th November 1760, John Abraball and P. Lloyd entered into an agreement (stamped with a two-shillings-and-sixpenny stamp) with the defendant *Browne*, whereby they agreed, "with all convenient speed, to grant a lease to him of, and they did thereby set and let to him," the premises in question; to hold for 21 years, at the rent of 290*l.* per ann. payable

2. Black. 373.

able half-yearly "to the lessors:" the lease to contain the usual covenants, and certain special ones, in one of which the words "*this demise*" occurred. The defendant entered in pursuance of the agreement, and paid rent up to 1st March 1774. For the plaintiff it was urged, that this was only an *executory* contract in the intent of the parties; and if such intent appears, then, though proper leasing words be made use of, yet the law will rather do violence to the words, than to the intent; and 3. *New Abr.* tit. "*Leases*," 421. *Noy* 128. 3. *Burr.* 1556. were cited. For the defendant were cited, *Cro. Eliz.* 486. 1. *Roll. Abr.* 847. *Moor* 459. *Noy* 57. where a covenant that *A* doth let, and that a lease shall be made accordingly, was held to be a good lease immediately. What follows is only for further assurance. *Cro. El.* 33. *Hob.* 34. *Dalison* 7. And here it was manifestly the INTENT of the parties to make a present lease. The court held, that this was a good lease *in presenti*, with an agreement to execute a more formal and perfect lease *in futuro*. The operative words (*let* and *set*) are in the present tense. A reference is also made to "*this demise*." There have been fourteen years uninterrupted occupation under this instrument, and five or six of them since the title of the lessor of the plaintiff accrued. He has accepted rent, and thereby given the defendant every reasonable hope of acquiescence. Under such circumstances, if the words of the lease can import an *immediate* legal demise, the court will support it, as such; and that it will, is evident from the cases cited. — Judgment for the defendant.

4. T. Rep. 735.

In *Estwick v. Way*, the court governed itself by the same principle, in determining one point in that case; but as it also apparently decided another, namely, that the trustee of a term for the benefit of creditors (not having notice of an agreement for a lease made *previous* to the grant

grant of the term) may maintain an ejectment against the tenant in possession under the agreement, I have stated the decision at length. ASHHURST, J. delivered the opinion of the court as follows.—This was an ejectment brought by the lessor of the plaintiff, claiming under a demise made by Lord *Abingdon* to him, by deed dated in 1784, where the trust of the term was for the benefit of creditors. The defendant claimed under a lease, as it was opened by the defendant's counsel, dated 1779, prior, in point of time, to the demise to the lessor of the plaintiff. The agreement, when produced in evidence, appeared to be on paper, *unstamped*, and not under seal. It imported to be articles of agreement between Lord *Abingdon* and the defendant's father, by which the former, in consideration of a sum of money to be paid by *Way*, sold him the goods in his house at Rycot. The subsequent part of the agreement was as follows: "And further the said Earl of *Abingdon* doth hereby agree to let, and the said *Richard Way* agrees to rent and take, for the term of seven, fourteen, or twenty-one years, in case the said Earl shall so long live, at and for the rent of 1400*l.* a-year, to be paid half-yearly (the said Earl to pay or allow all manner of tithes and taxes, both ordinary and extraordinary), all his estate, &c. at Rycot. It is agreed, the said *Richard Way* shall enter upon all the said premises *immediately*, but not commence payment of rent until Lady-day next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties on or before Michaelmas next."—On the production of this, it was contended, that this being produced as a lease, and not being stamped, it could not be read in evidence; and the judge being of that opinion, the cause was not further gone into, and the plaintiff had a verdict. A motion,

motion has been made for a new trial, on the ground that this in fact was not a lease (though so opened by the defendant's counsel), but only an agreement. On the part of the plaintiff it was contended, that this was a lease, being by words *de presenti*; or, taking it not to be a lease, but only an agreement for a lease, then it gave the defendant only an equitable title, which cannot be set up in a court of law against the plaintiff, who has a legal title: so that either way the verdict was right. On the part of the defendant it was contended, that though in common parlance this may be termed a lease, it is in law only evidence of a parol demise, not being under seal; and that being only matter of evidence, need not be stamped. And as to the other objection, the answer, that the defendant's agreement is *prior* to the demise to the plaintiff, and that they could have proved that the plaintiff, at the time of the defendant's title, knew of the demise to him; and that the conveyance to him being a voluntary conveyance, he stands in the place of Lord *Abingdon*, and must be considered as trustee for the defendant; and the court will not permit him to bring an ejectment against his *cestui que trust*. As to the question, whether this is or is not a lease, we are all of opinion, that this is *not* a lease. The case in *Noy* 128. of *Sturgeon v. Paynter*, is in point. In the present case there is also an express stipulation that leases *should be* drawn before Michaelmas; therefore plainly was not the intention of the parties that the agreement should operate as a lease, but only that it should give the defendant a right to the immediate possession, till a lease could be drawn. Had it been a lease, and as such it was offered in evidence, we think the termination was right, that it ought to be stamped. For as to the argument, that the word *lease* is inserted

the stamp act amongst other instruments which are all specialties, and therefore that it shall not be intended that the legislature meant to include leases not by deed, we do not think any such intention can be inferred. The only object of the legislature was to raise a revenue from certain things enumerated: there is no reason why one of the things should be charged rather than another: it is a matter of mere positive institution; and as it falls within the words, there is nothing in the nature of the thing to take it out of them. But if we thought that this had been a surprize upon the defendant, and that by granting a new trial we could enable him to make use of this paper as an equitable agreement, and to set it up as a valid objection to preclude the plaintiff from bringing his ejectment, we perhaps should not refuse it. The ground on which the defendant rests his title is this: it is said, that the lessor of the plaintiff only represents Lord *Abingdon*, it being a voluntary conveyance, and is to be considered as trustee for the defendant, and as such shall not bring an ejectment against his own *cestui que trust*. If we were to decide *that*, it would be going a great deal farther than has ever yet been done. The only cases where this principle has been adopted, are where the lessor of the plaintiff has been *clearly and unequivocally* a trustee for the defendant, and it would have been of course for the court of chancery to have decreed a conveyance to him. It is not necessary for us to say what a court of chancery might do in the present case; but thus much we may say, that it is not a mere voluntary conveyance to the lessor of the plaintiff. It is made to him, as a trustee, for the benefit of creditors; and is the same as if a mortgage had been made to any individual creditor, and he had brought the ejectment. In that case it might perhaps be contended, that as each party

See 2. Dougl
721. 8vo.

party had an equitable claim on Lord *Abingdon*, who ever first got the legal title to the estate, ought not to be divested of it by a court of equity. But we do not mean to give any opinion as to this: it is enough for us to say, that this being, at least, a doubtful equity, which the defendant sets up against a legal title, this court or a judge at *nisi prius*, would not, and ought not to interpose; and therefore it would be nugatory to send it down to a new trial.—Rule discharged.

BUT in the case of a *copyhold*, where the instrument contained terms of an immediate demise, subject to a licence for that purpose from the lord, it was deemed an *executory* agreement only, and not a lease, and that within the *intention* of the parties. Such was the case of

a.T.Rep. 739. *Coore v. Clare*. In that case the lessor of the plaintiff proved payment of rent by the defendant, and notice to quit, and there rested his case. The defendant produced a paper writing, written upon an agreement stamp, under the hand and seal of *T. Tidd*, of whom the lessor of the plaintiff purchased, dated 4 October 1786, and made between *Thomas Tidd* and *Thomas Clare*, reciting, that *Mary Statham*, widow, was seised of, &c. [describing the premises, which were *copyhold*] for her life; and that *Tidd* had agreed with *Clare*, that in case he should be seised of the premises on the death of *Mary Statham*, he would immediately on her death demise and let them to *Clare* on the terms and conditions mentioned: “now, therefore the said *Tidd* doth hereby agree to demise and let unto the said *Clare* all, &c. and all such copyhold premises as he shall or may be entitled to on the death of the said *Mary Statham*, to hold from and immediately after the death of *MARY STATHAM*, for the term of 21 years, at the yearly rent of 12l. 12s. And the said *Tidd* doth hereby promise and agree to and with the said *Clare*, that

he the said *Tidd*, on the death of the said *Mary Statbam*, and on his becoming entitled to the said premises, *shall and will procure a licence to let the said premises, &c.*"

LORD KENYON was of opinion, at the trial, that the instrument amounted to a lease, there being words of present demise contained therein, and therefore nonsuited the plaintiff.

ON the motion for a new trial, it was contended, that the writing was only an agreement for a lease, not a lease itself, and consequently no legal bar to the ejectment. The case of *Estwick and Way* was cited and relied on; and that the intention was executory, was, among other circumstances, manifest from the stamp being only such as was required for agreements, which was not proper for a lease. For the defendant it was insisted, that, from authorities, ancient as well as modern, the objection was warranted; that the instrument was a lease, and not merely an agreement; that it was a present demise, though possession was to take place at a future time. In support of the position, the case of *Baxter and Brown* was cited; also *Hob. 34. Ante, 27. W. Jones 231. Cro. Car. 207. 1. Roll. Abr. 847. X. 1. Cro. El. 33. Moor 31. Dy. 125. pl. 44. 2. Mod. 79.* And showing it to be only an agreement under which the defendant had actually taken possession, according to the case of *Yea and Bucknell*, the plaintiff, who claimed *Ante, 26.* title under the same person who made it, could not recover the possession from the defendant. LORD KENYON said, that having consulted with the other judges, he was clearly convinced he was mistaken in the opinion which he had held at the trial; and that they were all of opinion, that the instrument in question was an executory agreement only, and not a lease, for two reasons:

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first,

first, because, if this were held to be a lease, a forfeiture would be incurred; whereas that would be contrary to the intent of the parties, who had cautiously guarded against it by the insertion of a covenant that a licence to lease should be procured from the lord: and, secondly, the stamp is conformable to the nature of an agreement for a lease, and not adapted to an absolute lease.—Rule absolute.

3. T. Rep. 163. So, in *Jackson against Ashburner and others*, assignees of *Scarisbrick*, a bankrupt, a verdict was taken for the plaintiff, with liberty to enter a nonsuit, if the court should be of opinion that the instrument by which the lessor of the plaintiff claimed title, was *only an agreement for a lease*, and not an ACTUAL lease. The articles were as follow.

“ March 4, 1783. Articles of agreement between *Thomas Scarisbrick* and *D. Jackson*, entered into in regard to his

“ fulling mills, dry-salting mills, and other conveniences

“ for carrying on said trades: that the mills and conveniences, with the islands and acre of land *Mintsford*, called *Ashacre*, he *shall enjoy*, and I engage to give him

“ a lease in, for the term of 31 years from *Whitfuntide* 1784, at the rent of 110l.; and that I will purchase

“ one yard in breadth, to be laid to the Race from the

“ High Clews, the length of *Charles Close*; and if it be

“ bought, and the purchase is more than 200l. per acre,

“ he the said *D. Jackson* to pay more than it costs beyond

“ that rate: and that the old counting-house be brought

“ out as far as the engine-house; and that towards the

“ alteration *J. Scarisbrick* is to furnish timber and slating

“ for the roof: that *D. Jackson*, on his part, engages to

“ keep the mills, weir, and every other matter, in repair,

“ he having at all times the privilege of the roads to make

“ what repairs may be wanted.”

LORD KENYON. It is of importance to the public that some certain rule should be laid down, and that the question should not be floating, whether a particular agreement should be considered as a lease, or merely as an agreement FOR a lease; and this must depend on the intention of the parties, to be collected from the whole of the agreement. The case of *Drake and Munday* was properly decided; Cro. Car. 107. where the words were, "the defendant SHALL HAVE and enjoy," &c. without any others, to qualify the expression. Those words were sufficient to give the legal interest; they would be operative in a bargain and sale, or in covenant to stand seised to uses. But in this case there are other words to qualify those, "shall enjoy," and to restrain their operation, so as to make the agreement merely executory. In *Coore v. Clave*, I wished, as *Ante*, 32. as I could, to consider it as a lease; but the court was of a different opinion. In the case of *Barry v. 5.T.Rep* 165. I thought the words were express and unequivocal, and should have no other meaning than that given to them, namely, that they should operate as words of present demise; they were, "bath set and doth demise." There too the question was, whether or not they should operate against the party making the agreement? But they were positive in themselves, and there was nothing to abridge their meaning. Here the words are, "he shall enjoy, and I engage TO GIVE him a lease," &c. and the single question is, what was the intention of the parties using those expressions? Was it that the agreement should confer the legal interest? or, was it not in their contemplation that there should be another instrument to give that legal interest? The latter words clearly shew it was the intention of the parties, that there should be some other assurance. It was *in fieri* at that time; and if a bill had been filed in a court of equity for a specific performance of the agreement, that court would not have

turned the plaintiff round, and told him that he already had a legal and executed contract, but would have decreed a lease according to the agreement. If the former words in this contract had not been restrained by the engagement, *to give* a lease in future, they would have operated as a perfect lease; but as the parties agreed, the one to give, and the other to receive, a *future* lease, I cannot conceive that *this* was intended to be a *present* lease. Besides, by another part of the agreement, the landlord was to acquire an additional piece of ground to be laid to the mill, without which the lease was not to be granted; this also is of importance to shew that there was to be some *future* instrument to give title to the plaintiff. All the cases cited may be answered by one observation, namely, they were either express words of present demise, or equivocal words accompanied with others, to shew the intention of the parties that there should not be a future lease: but in this case, where the context, in which I find the words "*shall enjoy*," imports that the parties do *not* mean that they should operate as a present demise, I think we should decide contrary to the intention of the parties, if we were to determine they should have that effect.

ASHHURST, J. I entirely agree to the position, that whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties, which must be collected from the words of the agreement and from collateral circumstances. Where the words are, "*de presenti* I demise," &c. or an agreement that the party "*shall hold and enjoy*," and the party is immediately put into possession, the landlord shall not afterwards turn him out, and say it was not a present demise; for permitting the party to enter, is strong evidence to shew that the landlord intended to give a present

nt interest. But where the words themselves do not necessarily imply it, where possession is not given, and there is no other act to manifest such an intention, then it is merely an *executory* contract. Now here the words themselves import an *executory* agreement; for the words *shall enjoy* are followed by "I ENGAGE TO GIVE him a lease, and "I will purchase, &c. to be laid" to the rest, &c. The smallness of the quantity of land to be purchased and added to the rest, cannot vary the case; because the whole depends, *not* on what was granted at the time, but on what *was to be* granted afterwards. Besides, the rent is agreed upon at all events; and if this were construed to be a lease, the landlord would have a right to distrain for the whole rent, although the addition were not afterwards made by the purchase; and the only remedy left to the tenant would be an action at law, or a bill in equity. It is observable also, that the agreement was made in *March* 1783, and was not to take effect until *Whitsuntide* 1784. The meaning of the parties therefore nearly was, that some *further act* was to be done to give the plaintiff a legal title; and even that was to depend on another act at that time uncertain, namely, the purchase of the additional ground *by the landlord*.

GROSE, J. The question arises on *the intention* of the parties, whether this agreement was or was not to convey present interest to the plaintiff; and on that intention ground my opinion. Now, considering the parties, the place, as it existed at the time of the agreement, and as it was to exist afterwards, the dates, and *quantum* of the rent, I do not think it was intended to give a present interest. In *March* 1783 the parties met, and agreed that a year afterwards the plaintiff *should have* a lease of certain premises, therein specified, at the rent of *£100* and another piece of land, if the landlord could

purchase it; and other things were to be done between that time and the time the lease was to be granted; for though it is not expressly mentioned, that those things were to be done before the lease was to be granted, I conceive *that* is the true construction of the agreement; for until that time the premises to be occupied, and the sum to be paid by the plaintiff, were uncertain. The whole was then conditional, and the lease was afterwards to be drawn, in this or that form, according to *future* circumstances. The true exposition of the agreement, and of the intention of the parties, seems to be, that this should *not* operate as a present demise, but that there should be a lease in future.—Judgment of nonsuit to be entered.

- AND even in the case of a *lease* for years; if the duration of the term be doubtful, the court will so construe the instrument, as to give effect, if possible, to the intention of the parties, provided it be not contrary to law: as in *Holmes v. Wilson*, 1 T. Rep. 461.
3. T. Rep. 461. *v. Richardson*. In that case a verdict was found for the plaintiff, subject to the following case: *William Child* being seised in fee of the premises, on 28th of October 1786 demised the same to *James Moss*, from whom the defendant derived title, “at the yearly rent of 10l. payable “half-yearly, for the term of three, six, or nine years “from the Feast of St. Thomas the Apostle ensuing the “date, and to be complete on the said Feast, *which should* “*be determinable in the years 1788, 1791, 1794,*” with a covenant by the tenant to repair during the term or term thereby granted. On 13th June 1786 *William Child* surrendered the premises (being copyhold) to the lessor of the plaintiff, who on 28th May 1787 was admitted. On 13th December 1788 the lessor of the plaintiff served the defendant with notice to quit, on or before the Feast-day of St. Thomas the Apostle ensuing. For the plaintiff it was contended, that by the terms of the demise, a term for

only three years certain was granted, consequently the notice given was sufficient to entitle the lessor of the plaintiff to recover: that three ingredients were necessary to the existence of every term, *certainly* as to its commencement, continuation, and determination; therefore, Plow. 272. though this lease was good for the first three years (as was held in *Ferguson v. Cornish*, where on a lease for seven, 2. Burr. 1034. fourteen, or twenty-one years, LORD MANSFIELD said "it was undoubtedly a good lease for seven years"), yet it was void as to the rest for the uncertainty; for it was the same as if it had been for three years, or six years, or nine years. And in that case, Lord Mansfield, after saying it was a good lease for seven years, added, "whatsoever may be the validity of it as to the other two eventual terms of fourteen and twenty-one years;" by which he hinted a strong opinion that it was bad for the remainder. If this had been a lease for three years, and so from three years to three years, during the life of J. S. it would have been a good lease for six years, for during Plowd. 273. six years there was certainty; but void as for the remainder, 1. Inst. 45. b. because uncertain how many more years J. S. might live. And this was not like a demise for *nine* years, determinable at three, or six, because that would be a certain lease for nine years at its commencement, unless either of the parties should determine it at one or other of those periods; but here it was uncertain at first, whether the demise was for three, six, or nine years.

LORD KENYON. There is no doubt of what Lord Mansfield's opinion would have been in *Ferguson v. Cornish*, as to the validity of the lease beyond the first seven years (a).

(a) In that case Lord Mansfield said, "the defendant was certainly in possession, and shall as certainly pay the rent. It was at least a lease for seven years; then, if he continues, it is for fourteen years; if, at the end of that time, he still continues, it is for twenty-one years."

In these cases, *the intention of the parties ought to prevail, if it be not contrary to law.* It is true, there must be certainty in the lease as to the commencement and duration of the term; but that certainty need not be ascertained at the time; for if, in the fluxion of time, a day will arrive which will make it certain, that is sufficient. As if a lease be granted for 21 years, after three lives in being, though it be uncertain at first when that term will commence, because the lives are in being, yet, when they die, it is reduced to a certainty, and *id certum est quod certum reddi potest*: and such terms are frequently created for raising portions for younger children. Now, in this case, it is impossible to form any doubt respecting *the intention of the parties.* It was intended that this lease should take effect for three years, at all events: that it should be in the election of either of the parties to put an end to it at that time, or at the end of six years, giving reasonable notice to the other. It is like a lease for a year, and so from year to year; where, if the lessee wish to determine at the end of the year, he must give reasonable notice to the other party. And though, here, either of the parties might have determined the lease at the expiration of the first three years, yet when the time elapsed, when notice ought to have been given for that purpose, the lease could not be determined till the end of the next three years: consequently, the lessor of the plaintiff is not entitled to recover.

ASHHURST, J. All required is, either that the term should be certain in itself, or reducible to a certainty. Now that is the case here; it is for three, six, or nine years, as the case may happen; the parties having agreed, that it should be determinable in the years 1788, 1791, 1794. It is therefore a lease for three years certain, or for six or nine years, unless the parties determine it sooner.

BULLER,

BULLER, J. This is a lease for nine years, determinable, by either of the parties, at the end of the first year or six years; for it is stated in the case, that it is terminable in the years 1788, 1791, 1794: but if it were determined at either of those periods, the party first giving reasonable notice, it was to continue for nine years.—*Posita* to the defendant.

In short, in all cases where the court must decide on the intention of parties, it will do all that *in justice* it can, ^{3. T. Rep. 479. 665.} and give effect to that intention; and that whether it arises from a will or on a deed, from a surrender, or any other instrument; and where sense requires it, many cases may be produced, to shew that it may construe the word *or* into *and*, and *and* into *or*, to effectuate the intent of the parties.

<sup>2. Stra. 1175.
3. Ark. 390.</sup>

THE CONVEYEE of a *statute-merchant*, or *statute-staple*, and a tenant by *elegit*, may maintain an ejectment; for though these tenants have but a chattel interest, and that for a period of uncertain duration, *viz.* till their debts are satisfied, yet that being a permanent interest, the law has provided for its security by this action. ^{Co. Lit. 42.}

SO AN EXECUTOR may sustain this action, on an ejectment done to the testator: for though at the *common law* it was held, that personal wrongs died with the person, when the *statute* gave the action for goods taken out of the possession of the testator, it seemed but an equitable construction of the act, to extend the remedy to terms for years, and punish the trespass on that species of property; and as leases for years were looked upon as goods and chattels, it was but reasonable to bring them all under the same regulation. <sup>1. Vent. 30.
7. H. 4. 6. b.
4. Ed. 3. c. 6.</sup>

3. Burr. 119.

3. Burr. 2830.

AN ejectment being a possessory remedy, the lessor the plaintiff must have a *right of entry* (which is a right not assignable), when this action is brought; for if the entry be taken away, he cannot legally enter to make lease, to try the title; and he cannot be allowed to prosecute his right by an unlawful act; therefore, in the case of a special verdict, it ought to appear that the lessor of the plaintiff might enter at the time he brought the ejectment. The old method of proceeding in ejectment required, and the modern practice *supposes*, an actual entry; and though that practice obliges the defendant to confess *lease entry and ouster*, in case of the parties, and to expedite the trial, yet this has made no alteration in the law, nor was ever intended to better the plaintiff's title, or to give him a new right of entry; for they were, by rule of court, to oblige the defendant to admit a better title in the plaintiff than he really hath, which would be an act of injustice: therefore, where tenant in tail makes a discontinuance, the issue in tail is put in his *formedon*, and cannot have an ejectment, because the entry, by the discontinuance, is taken away.

Cruise, 1. v. 56.

3. Black. Com.

371.

Finch, L. 190.

THE injury of discontinuance happens, when he who hath an estate-tail maketh a larger estate of the land than by law he is entitled to do; in which case the estate is gone so far as his power extends who made it, but no farther. As, if tenant in tail makes a feoffment in fee-simple, for the life of the feoffee, or in tail; all which are beyond his power to make, for that by the common law he tends no farther than to make a lease for his own life here the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury which is termed a discontinuance; the antient legal estate, which ought to have survived to the heir in tail, being, if not gone, at least suspended, and for a while discontinued. For in this case

the death of the alienors, neither the heir in tail, nor any in remainder or reversion expectant on the determination of the estate-tail, *can enter on and possess* the lands alienated. The owner of the estate cannot enter, but 3. Com. 175. driven to his real action; for herein the *original* entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. "No sooner," in the opinion of Lord Mansfield, "had the statute *de Donis* repeated what the law of tenures had said before, that the tenor of the grant should be observed, than the same bent permitted tenant in tail of 1. Burr. 115. the freehold and inheritance to make an alienation, 118. *avoidable* only under the name of a *discontinuance*. But this was a small relief." A *discontinuance* does not 1. Wilk. 57. however give a right.

TENANT in tail male, with remainder over in fee, in *Odiarne v. Whitehead*, 2. Burr. 704. consideration of a marriage, conveyed his estate tail, by *lease and release*, to trustees and their heirs, to several uses, and in the release covenanted to levy a fine to the same uses. The marriage took effect, and tenant in tail *levied a fine*, pursuant to his covenant. On the death of tenant in tail without issue, the remainder man in fee made an actual entry, to avoid the fine, and then brought ejectment. The question was, whether the ejectment could be sustained? For the plaintiff, *Seymour's case* was 10. Rep. 95. cited and relied upon, as an authority in point; from whence it was inferred that the plaintiff might maintain the ejectment (an actual entry having been made to avoid the fine), unless a *discontinuance* could be proved. To show that no *discontinuance* had taken place, and consequently that the remainder of the lessor was not *divested*, the operation of the *lease and release*, and of the *fine*, were considered, forming (as it was argued) quite *distinct* conveyances.

veyances. It was admitted, that a *feoffment*, a fine *which passes a freehold*, or a common recovery, will discontinue an estate-tail; because a fee-simple passes by them, which is a greater estate than the tenant in tail can lawfully convey: but it was insisted in this case, that the fine passed not any freehold; that having been, *previous* to levying the fine, conveyed by the lease and release. That the fine, levied *after* the marriage, being a *distinct* conveyance executed subsequent to the lease and release, all that it did or possibly could do, was only to *confirm* and corroborate the *base fee* (which passed by the lease and release), and make it more durable. But the court was of opinion that the lease, release, and fine, were all but *one assurance* and operated as such: that the reversion in fee was therefore discontinued, and the remainder in tail divested, so as to take away the right of entry in ejectment, and put the remainder man to his *formedon*. That the operation of the deeds and fine ought not to be distinctly considered, as that would defeat the intention of the parties, and, instead of supporting *lawful* estates, would tend to overturn all the family settlements in the kingdom. That the deeds could only be considered as a *covenant to levy a fine* and were incomplete until the fine was levied, and only operated as a declaration of *its uses*, so that the estate-tail passed by the fine. That *Seymour's* case was decided on *different* grounds, and materially varied from the present case; inasmuch as in that case, the fine was not levied until a year after the bargain and sale was inrolled; and it was expressly found by the verdict, that the bargainee entered and was seised by force of the bargain and sale *only*; so that the bargain and sale was totally unconnected with the fine: nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

AND in the case of *Moore v. Blake*, which was an eject-^{Lent Allize}
 ment tried before the late Mr. Justice GOULD, the title of ^{at Maidstone,}
 the lessor of the plaintiff was under a marriage settlement;
 which certain premises were settled on the husband
 and wife, for their lives and the life of the survivor; re-
 mainder to trustees to preserve contingent remainders;
 remainder (after a power of appointment, which had ne-
 ver been executed) to all and every the children of the
 marriage, as tenants in common, *in tail*; with cross re-
 mainders, in default of issue of any child, to the survivors
in tail; with remainder to the survivor of husband and
 wife in fee. Three daughters were the issue of the mar-
 riage; one of whom died without issue; the second
 married the lessor of the plaintiff; and the third married
 the defendant *Blake*, and died in October 1787, *without issue*:
 previous to her death however, she and her husband had
 levied a fine, with proclamations, of her moiety, to re-
 cover which the ejectment was brought. The counsel
 for the defendant proved the fine levied, with procla-
 mations; upon which the plaintiff was nonsuited; the
 learned judge declaring, that, in his opinion, the levying
 of the fine had discontinued the estate-tail, taken away the
 plaintiff's right of entry, and driven him to his writ of
medon.

It is however a settled rule of law, that in order to
 work a discontinuance of an estate-tail, it is necessary that
 the party discontinuing should be *actually* seized by force
 of the intail.
 1. b. Ten. 117. 2. Danv. 577. T. Raym. 36. 1. Sid. 83. 1. H. Black. 259.
 Lit. f. 637.
 1. Co. 76.
 Hob. 273.
 1. Lev. 34.
 1. Roll Abr.
 634.

By the common law, the alienation of an husband who
 is seized in right of his wife, worked a discontinuance
 of her estate. But now, by 32. H. 8. c. 28. it is pro-
 vided, "that no act of the husband only shall work a
 discontinuance."

“discontinuance of, or prejudice, the inheritance of
 “freehold of the wife; but that, after his death, she
 “her heirs may enter on the lands in question.”

F. N. B. 194. FORMERLY if an alienation was made by a sole corporation, as a bishop or a dean, without consent of the chapter, this was a discontinuance. But by the disabling statutes, this is now antiquated; those acts declaring such alienations absolutely void *ab initio*; of course, at present, no discontinuance can by such means be effected.

1. El. c. 19.

13. El. c. 10.

ANOTHER way of tolling, or taking away the right of entry, is by DESCENT; for the law presumes that the possession, which is transmitted from ancestor to heir, is a rightful possession, until the contrary be shewn; therefore the mere entry of him who has right, is not allowed to evict the heir.

Lit. f. 385-413
 3. Black. Com.
 176.

DESCENTS which take away entries are when any one seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by *this* summary method, but is driven to his action to gain a legal *seisin* of the estate. And this, first, because the heir comes to the estate by act of law, not by his own act; the law therefore protects his title, and will not suffer his possession to be disturbed, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title; therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title, and leaves the claimant only the

medy

of a formal action against the heir. Thirdly, this Co. Lit. 137. is admirably adapted to the military spirit of the feudal ages, and tended to make the feudatory bold in war; so that his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seised. Lastly, it is said to be agreeable to the dictates of reason, and the general principles of law.

For in every complete title to lands, there are two things necessary; the possession or seisin, and the right or property therein; or, as it is expressed in Fleta, *juris et possessionis conjunctio*. Now, if the possession be severed from the property, as if *A.* has the *jus proprietatis*, and *B.* by unlawful means has gained possession of the land, this is an injury to *A.* for which the law gives a remedy, by putting him in possession; but does it by different means, according to the circumstances of the case. Thus if *B.* who was himself the wrong-doer, and hath obtained possession by either fraud or force, hath only a bare naked possession, without any shadow of right; *A.* therefore, who hath both the *right of property* and the *right of possession*, may put an end to his title at once, by the summary method of *entry*. But if *B.* the wrong-doer, dies seised of the lands, then *B.*'s heir advances one step farther towards a good title; he hath not only a bare possession, but also an apparent *jus possessionis*, or right of possession. For the law presumes, that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shewn: therefore the mere entry of *A.* is not allowed to evict the heir of *B.* but *A.* is driven to his action at law, to remove the possession of the heir; though his *entry* alone would have dispossessed the ancestor. So that, in general, it appears that no man can recover possession by mere entry of lands which another hath by *decent*. Yet this rule hath

Lit. l. 3. c. 6. hath some exceptions, wherein the reasons cease upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there is no neglect or laches in the claimant, and therefore no descent shall bar or take away his entry.

1. Burr. 89.

A right of possession, and a right of entry, are convertible. But by 32. H. 8. c. 33. "if a *disseisor* die within five years after the *disseisin* done, and the lands descend to his heir, such descent shall not take away the entry of the *disseisee*, though he has made no claim." But if there be five years quiet possession in the disseisor, continuing claim is still as necessary as it was before the statute. Here it may be proper to enquire, what the old law meant by a *disseisin*, which constituted the tenant of the freehold in respect of every demandant suing out a *præcipe*, although the owner's entry was not taken away; for when the right of *possession* was acquired, and the owner put his real action, there, without doubt, the possessor had got the freehold, though by wrong. On this head, Lord Mansfield compressed a great part of the history, the whole of the principles, and most, if not all, of the cases on the subject, in the judgment which he gave in the case of *Taylor v. Horde*.

1. Burr. 60.

1. 7.

Cowp. 689.

"ALL the law concerning disseisins existed and was in practice before the assise of novel disseisin. The assise was introduced probably from the usage of Normandy; for the *Grand Coutumier* treats of assises in or before the reign of Henry the second. Glanville, who wrote in that reign, calls the great assise a benefit, "*clementiam principis de a* "*filio procerum populis indultam.*" And the Myrrour for Magistrates says, "Glanville introduced it." Seisin is a technical term, which denotes the completion of that investiture by which the tenant was admitted into the tenure; and without which, freehold

C. 2. f. 25. p.

252. edit. 1642.

freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse.* Disseisin therefore must mean, some way or other, turning the tenant out of his tenure, usurping his place and feudal relation. At this time no tenant could alienate without licence of the lord. When the lord consented, the only form of conveyance was by feoffment, publicly made, *coram paribus curiæ*, with the lord's concurrence. Homage or fealty was solemnly sworn, suit of court and services were frequently done. The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers. The freehold never could be in abeyance, because the lord could never be at a loss to know upon whom to call as his tenant, nor a stranger to know against whom to bring his *præcipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted, and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*. If the disseisor died after one year's non-claim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The feoffee of a disseisor acquired title of possession, at this time, by one year's non-claim; but the statute 32. H. 8. c. 33. requires five years non-claim. The descent to his heir remains privileged, as it was at common law; for the 32. H. 8. c. 33. extends not to any feoffee of the disseisor, immediate or mediate. The feoffee of a disseisor was favoured, because he came innocently into the tenure, by solemn public investiture, with the lord's concurrence. But the statute '*Quia emptores terrarum*' (which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the King as of an honour or manor), and other statutes, which extended the power of alienation to the king's tenant *in capite*;

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12. C. c. 23.
13. C. 2. c. 7.

the frequent releases of feudal services; the statutes of Uses and of Wills; and, at last, the total abolition of all military tenures, have left us little but the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the thing originally signified by those sounds. The idea which modern times annex to freehold or freeholder, is taken merely from the duration of the estate. Copyholds, and the customary freeholds in the North, retain some faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder or customary freeholder, *de facto*, in prejudice of the rightful tenant. It is obvious too, that usurping such a tenure, is a different fact from the naked possession or occupation of the land. But whoever will look into the practice of other countries, where tenures subsist, with all the solemnities of feoffments and seisins, upon every change of a tenant, by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that, at the time alluded to, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation. Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin, differed from a possessor by wrong. Bracton, *de Assisa Nova Disseisinæ*, puts many cases of possession wrongfully taken, which he calls intrusion, because there is no disseisin. "*Possessio quæ nuda est omnino, et sine aliquo vestimento; quæ dicitur intrusio.*" VESTIMENTO is seisin, investiture (from whence the Saxon term, *vest*); a metaphor which the feudists took from cloathing, and by which they meant to intimate, "that the naked possession was cloathed with all the solemnities of feudal tenure." A particular tenant, according to feudal notions, was in, as of the seisin of the fee, of which his estate was part. If he aliened the fee (which he could only do by solemn feoffment,

at, with the concurrence of the lord of whom the fee
held), he forfeited his particular estate, for having be-
ed the seisin with which he was entrusted. But on
ount of the privity and confidence between him and
reversioner, and the notorious solemnity of the act
investiture, his feoffment disseised the reversioner.
ton, who wrote in the reign of Henry III. before
ants could aliene without licence, mentions the dis-
in, in this case, as a necessary consequence, and as a
ng which could not possibly be otherwise. "*Item fa-*
it quis disseysinam, cum quis in seysina fuerit us de libero te-
nemento et ad vitam, vel ad terminum annorum, vel nomine
custodia, vel aliquo alio; aliam feoffaverit, in prejudicium
veri domini, et fecerit alteri liberum tenementum; cum duo
simul et semel, de eodem tenemento et in solidum, esse non
possunt in seysina." He considers it as impossible for
true tenant not to be put out, when another actu-
came into his place. So late as the 32d of Eliz. in
case of *Malleson v. Trow*, the distinction upon which 1. Leon. 209.
judgment turns is, "that *Henry Denny* gained a
wrongful possession in fee; but did not gain any seisin,
so no disseisor; therefore the descent to his heir is not
privileged." Nobody can disseise the king; neither
any one be disseised to the use of the king. The king
y be wrongfully dispossessed; but the intruder's in-
ious possession is *sine aliquo vestimento*, and called in-
sion. The king cannot be made a disseisor; not be-
use it is wrong, for he may, in fact, withhold the pos-
sion of land from a subject, contrary to right; but the
son seems, according to the feudal system, to be this:
subject never could stand in the king's seisin or tenure;
the king never could be in the feudal relation of a
ject. By that policy all real property was held, im-
ately or immediately, of the king. In the king himself,
real property was allodial. The precise definition of

what constituted *disseisin*, which made the disseisor tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but is not now to be found. The more we read, unless we are very careful to distinguish, the more we are confounded. For after the assise of *novel disseisin* was introduced, the legislature, by many acts of parliament, and the courts of law, by liberal constructions, in furtherance of justice, extended this remedy, for the benefit of the owner to every trespass or injury done to his real property, and by bringing his assise, he thought fit to admit himself disseised. It lay against advisers, aiders, or abettors, who Co.Lit. 180.b. were not tenants. It lay against the tenant who was Stat. Glouc. disseisor, as the heir of a disseisor or his feoffee. For the owner, against the disseisor of the disseisor. The tenant not being ready to pay rent seck, when demanded, was Lit. sect. 233. for the benefit of the owner's remedy, a disseisin. It lay 2. Inst. 412, 413. for outrageous distress. Against guardian, or particular tenant, who made a feoffment, as well as against the feoffees. The stat. of *Westm. 2. c. 25.* extends it to a man's depasturing the ground of another, or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. If a guardian assigns dower to a woman not dowable, the owner may Secy. 427. elect to make her a disseisor. In a word, for the sake of 24. Ed. 3. 43. Cro. Car. 203. the remedy, as between the true owner and the wrongdoer, to punish the wrong; and, as between the true owner and the naked possessor, to try the title; the assise was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments. The reports of assise can only relate to cases where the owner admits himself disseised. The Law-books treat of disseisin with a view to the assise; which was the common method of trying titles till ejectment came in use. Littleton, who wrote long after the remedy by assise was enlarged by the

ates and by equitable construction, speaks of *disseisin* principally as between the owner and trespasser or possessor, with an eye to the remedy by assise. These are the common authorities from whence descriptions have been cited of a *disseisin*. The definitions in the books, though very imperfect, favour often of that which originally was an *actual* disseisin in spite of the owner. Litton defines disseisin with an &c. "where a man enters into lands or tenements, where his entry is not congeable, and *ousteth him* which hath the freehold, &c." The comment says, "every entry is no disseisin, unless there be an *ouster* of the freehold:" and, "disseisin is Co.Lit. 153.b; putting a man out of seisin, and ever implies a wrong; but dispossession, or ejectment, is putting out of possession, and may be by right or wrong. *Disseisin est un personal trespass de tortious ouster del seisin*." Though the term "*disseisin*," used, happens to be the same, the thing signified by that word, as applied to the two cases of *actual* disseisin, or disseisin by *election*, is very different. The distinction of *disseisin* AT ELECTION, is made in the case of *Blunden v. Baugh*. The three judges, with whom Cro.Car. 303. agreed the four judges of the common pleas, argued and held, "that the lessee for years of tenant at will, was a disseisor *at the election* of the original lessor, for the sake of his remedy; but never could be looked upon as a freeholder, or a disseisor in spite of the owner, or with regard to third persons." If a *præcipe* was brought against him, he might say, "I am not tenant to the freehold." When the easy specific remedy was by assise, where the entry was not taken away, the injured owner might, for his benefit, *elect* to consider the wrong as a disseisin. So since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession. Where an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title ac-

erued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease; but there is no real or supposed re-entry after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry. If the lessee for life or years makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will be considered as disseised. *Maccalf* on the demise of *Kynaston v. Parry and others*, a case reserved at Salop assizes, 25th March 1742, for the opinion of the court of exchequer (who gave judgment in it on the 24th of November 1743), was thus: 'Tenant in tail of lands leased by his father to a second son for lives (under a power) upon his father's death received the rent from the occupier, as owner, and as if no such lease had been made, during his whole life. He suffered a common recovery. It was holden, "that this was only a disseisin of the freehold, at election; that therefore he could not make a good tenant to the *præcipe*." And the recovery was adjudged bad. Except the special case of fines with proclamations, which stands entirely upon distinct grounds (the construction of the stat. of 4. H. 1. c. 24.), one can scarcely suggest a case where the true owner, whose entry is not taken away, may not elect, by pursuing a possessory remedy, to be deemed as not having been disseised. The consequences of ACTUAL disseisin, considered as such, continue law to this day. The disseised cannot dispose or devise; the descent takes away his entry. There are two cases cited in the case of *Blackden v. Baugh*, material to this point. The one, *Poussy v. Blackman*, which, in effect and operation, was this: Tenant at will made a lease for years; the original lessor devised. Though the lease by tenant at will, at the election of the original lessor, was a disseisin, yet they adjudged his de-

Palm. 201,
Cro Jac. 659.

ife good; because he had not elected to admit himself
 disseised, and, by making a will, intimated the contrary.
 Another case was in the 14th Eliz. Sir Ambrose Cone, of
 his own head, entered into lands of Sir William Hollis,
 and paid Sir William, afterwards, a certain rent, claiming
 to hold as tenant at will, and died. His heir entered;
 upon whom Sir William entered. It was adjudged,
 that, at the election of Sir William, Sir Ambrose was a
 disseisor; but as Sir William had not determined his
 election before the death of Sir Ambrose, and entered
 upon his heir, it was no disseisin, consequently the
 descent no bar to his entry." In the case of *Poussy* Palm. 105,
Blackman, it is said, "if a devisee devise, and after-
 wards enter, the devise is good." This *Dodderidge*
 denied, and said there must be a republication; which
 seems right, if there ever was a disseisin; for where an
 actual entry is necessary, it will not make good a convey-
 ance made before: as was holden in *B. R.* and *Dom. Proc.* A. D. 1738,
 in the case of *Berrington v. Parkhurst*. The actual entry
 could not support the lease made before. Yet in *Salk.* 237.
 it is agreed, "the devise is good, because he was seised Burton v. Coke.
 ab initio, so as he might bring trespass;" i. e. he never
 was disseised at all by his election; and he might make
 that election without an entry; he might bring his eject-
 ment, he might bring trespass without re-entry. If it
 was not for this doctrine of election, what a condition
 would men be in! In the case of *Poussy v. Blackman*,
 there was no entry; and, after much argument, it was re-
 solved, by the whole court, from the inconvenience which
 would be introduced, if lessee, by a secret contract with a
 stranger, could defeat the will of the lessor, "that the de-
 vise was good," and that the owner, by making a de-
 vise, shewed his election not to be disseised. Taking pos-
 session under a judgment in ejectment, never can be a dis-
 seisin of the freehold. Suppose it a real proceeding, the

termor of a disseisee might, at the old law, recover against the disseisor. He might recover against the feoffee of his lessor; but never could thereby become a disseisor of the freehold; he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of a freehold, his possession enured always by right, and never by wrong. If the lessor had enfeoffed, it enured to the alienee; if the lessor was disseised, and might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had a right of possession."

Co. Lit. 238.
Plowd. 47.

ABATERS and intruders are not within the statute of 32. H. 8. c. 33. for the statute, being penal, was only extended to cases where there was an actual ouster of the tenant, which is a consequence of all disseisins, whether done with or without violence. An abater or intruder ousteth no one; they therefore remain as at common law. But disseisors and their heirs are within the express meaning and intent of the statute, which gives the remedy to the disseisee; and though the preamble of the statute only speaks of "*disseisins with force*," and the body of the statute of "*such disseisins*," yet it was extended to all disseisins, as being within the same mischief.

11. Co. 33.
13. Co. 6.
Dy. 219.

Co. Lit. 238. a.
256.

NEITHER the feoffee nor donee of the disseisor, mediate or immediate, is within the statute, because he has not ousted any one; and therefore if such feoffee die, and the land descend to his heir, this descent will take away the entry of the disseisee or his heirs.

BUT bodies politic and corporate, so you hold yourself to a disseisin, are within the remedy of the statute.

there be tenant for life, the reversion in fee, and tenant for life is disseised and dies, and the disseisor afterwards dies within five years; the reversioner is within the benefit of the statute, and his entry is not taken away; *Ibid.* Plowd. 47. after the death of tenant for life, it is a continuation of the same disseisin to the reversioner. But if the disseisor died seised, and the tenant for life had died, there the entry would have taken away the entry of the reversioner, because there was no continuation of the same disseisin to the reversioner. The act only continues a right of entry in the disseisee, where a right of entry was once in the reversioner, nor could he have an *assise* or *writ of entry* in the first degree: and never having had the right of possession, he is not a disseisee within the statute, to punish him as an actual ouster; since it was no actual ouster of the reversioner, by the heir of the disseisor or his ancestor. Where you have the right of possession, you are not disseised; but if reduced to a mere right of *action*, that is another thing." Highly inconvenient as it was, that a descent, immediately after a disseisin, should take away the entry of the person disseised, and which continued till the legislature (32. H. 8. c. 33.) in some measure interposed its relief, the courts however never departed from the law; conceiving, no doubt, that where the law is clear, the argument from inconvenience is not admissible, tending, as it does, to undermine and overthrow the law itself. But though the right of entry was taken away in the cases stated, yet the policy of admitting them (or even the want of an *actual* entry in the person which now requires it) to have any operation peculiar to the remedy by ejectment, cannot, at present, be commended: a remedy, which has been "adopted in lieu of real actions, because they are embarrassed with a thousand niceties;—which has been modelled to answer,

"sway, in the best manner, every end of justice and convenience." As the legislature, so far back as the reign of Henry the eighth, interposed its authority to prevent any act of the husband from working a *discontinuance* to the prejudice of the wife; and in the same reign afforded relief to the *disseisee*; it would surely now, at the close of the eighteenth century, equally become its wisdom to remove every obstacle (arising from the mere right of entry to the remedy by ejectment. Where is the justice of permitting a plaintiff to be turned round, by a technical attention to the form of the action; which, in every other respect, is best calculated to try the real merits in controversy between the parties?

21. Jac. 2. c. 16. Now, by one of the statutes of Limitations (a beneficial system, of the greatest importance to the public, inasmuch as they are "statutes of repose"), "none shall make entry into land, but within twenty years after the right or title shall first descend or accrue." But the act hath the usual savings for infants, *feme covert*, &c. 7. Burr. 319. Therefore where there hath been no possession for twenty years, either in the lessor, or the plaintiff, or his ancestor, the plaintiff in this action will be nonsuited; unless he can account for the want of it, under some of the exceptions allowed by the statute.

7. Burr. 319. And twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but it takes away his right of possession, and gives a positive title to the defendant: for the plaintiff must shew a right of possession, as well as of property; and therefore the defendant need not plead the statute of Limitations, as in other cases.

7. Burr. 126. In the case of *Taylor ex dem. Atkins v. Horde*, the court at king's bench determined for the plaintiff upon the right; and against him upon the remedy, being of opinion that he

red of *that* by the statute of Limitations. On which judgment he brought a writ of error in the house of lords; who determined the *latter* point first and separately; and, adding the plaintiff to be barred of his remedy by ejectment, affirmed the judgment, without entering into the other point upon the right. But no length of time short of twenty years, would have that effect; for there is no instance of setting up any period within the limitation fixed by the statute, either as a bar to the plaintiff, or a title to the defendant. HOLT, Ch. J. heretofore said, "a possession for twenty years is like a descent which *tolls* entry, and gives a right of possession which is sufficient to maintain an ejectment:" as where *A.* had the possession of lands for twenty years, without interruption; *B.* then acquired possession, on which *A.* was put to his ejectment: here, though *A.* was plaintiff, yet his possession for twenty years is deemed a good title, and he recovered accordingly, in truth, if no other title appears, a clear undisturbed possession for twenty years, is evidence of a fee. Of reviving antiquated claims there would be no end; a long possession therefore may be considered a better title than can commonly be produced. It supposes, independent of positive acquiescence in the other claimants; and that acquiescence supposes also some reason, though perhaps unknown, for which the claim was forborne.

Cowp. 216.

Salk. 421.

Stokes v.

Berry.

Cowp. 397.

BUT, by the common law, the king was not affected by the statute of Limitations; and that privilege was deemed to his lessee. As where *A.* had a lease for ninety years from the crown, and was out of possession for more than twenty years, yet he recovered in ejectment; *A.*'s possession was that of the king, against whom, according to the maxim, *quod nullum tempus occurrit regi*, the loss of possession could not legally be objected. This maxim, which constitutes a part of the king's prerogative, obtained

2. Leon. 206.

Cro. El. 331.

obtained universally at the common law, and with good reason; for the law intended the king to be always benefited for the publick good, and therefore that he had no leisure to assert his right within the time limited to his subjects: but now, by the 9. Geo. 3. c. 16. a time of limitation is extended to the case of the king himself, who is thereby disabled to make title, except to liberties and franchises, beyond the space of sixty years, to be reckoned backwards from the time of commencing any suit, or proceeding, to recover the thing in question. So that now a possession for sixty years will even be a bar to the king's prerogative, in derogation to the ancient maxim before mentioned.

Ibid.

BUT if the crown had granted the reversion, the privilege did not follow it in the hands of the grantee.

2. Keb. 127.

1. Will. 176.

3. Will. 521.

NOR is a common person affected by the statute of limitations, where the possession is in the hands of his tenant, who has paid him rent within the time of limitation; for the possession of a lessee for years is the possession of his lessor, and payment of rent is an acknowledgment of the possession: so that during the continuance of the lease and payment of rent, the lessor is in no sense in default, for he cannot enter and take the *actual* possession, till the lease be expired; but *then*, it seems, he should, because his right of entry then *first* accrues.

6. Mod. 44.

Salk. 205.

5. Burr. 2605.

THE possession of one joint-tenant is the possession of the other, so as to prevent the statute from being a bar to either; for each joint-tenant has a right to the whole, and therefore the entry and possession of one is as good as that of both: and so it is of coparceners, and tenants in common. There must be an **ADVERSE** possession in order to enable the statute to run. In short, the

must be a disseisin, and *that strictly* proved; for the statute
 never runs against a man, but where he is *actually* ousted
 disseised. Perception of profits does not amount to
 expulsion. And where a lessee entered and enjoyed pre-
 sences under a *void* lease, and paid rent, he was held not to
 be a disseisor, but a mere tenant *at will*; and that his pos-
 session was the possession of his lessor; so that as the estate
 was never out of the family, there was no occasion to
 make any claim before the commissioners under 1. Geo. 1.
 50. relative to the forfeited Estates of Papists. So
 being born in one house, and receiving the rent of three
 others, by the medium of a mother and guardian, has
 been deemed a sufficient *actual* seisin by a *posthumous* son,
 who died at five weeks old, to bar the descent to his sisters
 of the half blood, and convey it to a collateral heir: to
 make a *possessio fratris*, that the land might descend to a
 remote heir of the *whole*, in preference to sisters of the
 half blood. Such was the case of *Newman v. Newman*;
 in which the rigid rule of *possessio fratris* was contended
 against, and investigated; and the doctrine relative to *actual*
 and *constructive* seisin enquired into and illustrated. In
 general, as to the operation of the statutes of Limitations,
 should be remembered, that when any of them has be-
 come to operate, no *subsequent* disability, namely, *marriage*,
madness, *insanity*, *imprisonment*, &c. (for which they almost
 uniformly provide) will impede its progress. If it could
 have such an effect on the construction of any one of them,
 it would equally affect the others. From the terms of
 the statute of Fines, the uniform construction of all the
 statutes of Limitations, and from the generally-received
 opinion of the profession on the subject, the principle
 ought not to be disturbed. It would be mischievous to
 waver on the subject, or to make any distinction whatever
 between voluntary and involuntary disabilities. In both
 cases, when the disability is *once* removed, the statutes at-
 tach.

1. Burr. 60.

5. Id. 2607.

2831.

1. Black. 675.

2. Black. 690.

Cowp. 217.

1. Will. 176.

Warren v.

Fearnside.

3. Will. 516.

2. Black. 932.

4. H. 7. c. 24.

attach. This point, though of no great difficulty, being of importance to questions arising on those beneficial statutes, the statutes of Limitations, the court of king's bench solemnly determined in the case of *Com. Dureour v. Jones*.

Cal.K.B. 373. If a declaration in ejectment be delivered within twenty years, and a trial had, in which there was a confession of lease, &c. yet if the plaintiff, being nonsuited in that action, bring another, after the end of twenty years, the confession in the first action will not be proof of an entry to bring the case out of the statute of Limitations. In such case, it seems (though from what is stated hereafter may be doubted), there must be an *actual* entry.

Hard. 460. If the king has judgment in an information of intrusion, this does not hinder a third person, a mere stranger to the suit, from entering and bringing his ejectment, because the king makes no title by the record of the judgment. And no *habere facias seisinam* issues, because the information does not suppose the king to be out of possession, but the contrary; and that a stranger intrudes on him: therefore on this judgment an injunction only goes to the party, and all claiming under him. But such judgment cannot bind a stranger, so as to take away his right of entry, to try his title in ejectment; because the king does not acquire any title by that record.

Id. 176. So if *A.* be outlawed, and his lands extended upon an inquisition, the outlawry and inquisition do not take away the entry of a third person who claims title to the lands extended; but leave him his remedy, by ejectment for recovery thereof. For the king acquires no title or interest in the land, but only to the profits, by the outlawry: and the possession of the lands still being in *A.*

absurd to suffer his outlawry to privilege it against entry of a third person, who might have been disseised of that land. But an intruder upon the king's possession neither have an ejectment himself, nor make a lease to another, on which his lessee can maintain an ejectment; and no man can recover in this action who hath not a possession, and a right of entry into it: the former is alleged in the declaration, and must be proved by confession of entry; but the rule of court is not so understood, as to *make* any part of the plaintiff's title, or better it. And as the king is not in, so neither can he be turned out of, possession, but by matter of record; consequently the intruder is not understood, in law, to have any possession by his intrusion, and cannot therefore maintain this action, in which the possession is recovered.

But where the possession is not *actually* in the king, as in lease to another, there if a stranger enter on the lease, he gains the possession, without taking the reversion of the crown; and may have his ejectment to recover the possession, if he be afterwards ousted: for there is a possession *in pais* and not in the king; and that possession is privileged by the prerogative. Hence it follows, that the king's lessee may likewise have an ejectment to recover the possession from the trespasser, and to recover the possession which was taken from him.

1. Leon. 265.
Cro. Eliz. 334.

covenanted to stand seised of land, to the value of 1000 *per annum*, to the use of himself for life, and after his death to the use of his daughters successively, who should be married at the time of his death, till they should severally receive and levy 500l. a-piece; remainder to his son. And the 30th of Eliz. and the son entered and possessed the land, in disturbance of the daughters, till the 42d of Eliz. when the eldest daughter (there being four of them) brought

Cro. Eliz. 105.
Noy 33.

brought her ejectment. But she did not recover the land because her entry was taken away, by suffering the son to enjoy it whilst she might have entered and levied her portion; and because she would otherwise keep the rest of the daughters from the perception of the profits: therefore it was held, that she had no other remedy against the son, who had received the profits to her prejudice.

1. Lev. 170.

1. Sid. 223.

262. 344.

1. Saund. 112.

1. Keb. 784.

915.

2. Keb. 20.

184. 270. 295.

Raym. 135.

158.

2. Wils. 127.

IF a rent be granted in fee, or otherwise, to *A.* with proviso, in case it be in arrear, to enter and hold the land till the arrears be satisfied out of the profits; if the rent be in arrear, *A.* may recover the possession in ejectment for the proviso creates an interest in the land, to answer the rent. And regularly, whoever hath an interest, to demise the same to another; consequently the person claiming under the demise may maintain an ejectment. And this may now be deemed a settled point, and whether the rent be created by grant at common law, or by way of use. But the proviso alluded to can only operate during the term; as in the case of *Johns v. Whitley* and others, the question resulting from the pleadings was whether the defendant *Whitley* had a right to enter, at the determination of a term of ninety-nine years, by the death of *Peter Knight*, and take the emblements of the closes, which he (*Whitley*) had ploughed and sown, his interest *at will* subsisted, in the life-time of *Peter Knight* notwithstanding the proviso, that it should be lawful for *Christopher Harris* (the lessor of the term) to re-enter the closes in which, &c. if the same should be let to any other person, without licence first obtained: as neither *Harris* or his heirs or assigns (or the plaintiff), entered before the termination of the term, for the breach of the proviso in ploughing and sowing the closes in question?

It was said, that if the lessor, his heir or assignee (the plaintiff), had entered for breach of the condition before the determination of the term, the defendant would certainly have had no right to re-enter and take the emblements; and that although the plaintiff did *not* enter during the term for the condition broken, but entered only at the determination of the term, it should have the same effect as if he had so entered; and, being in by law, should take advantage of the breach of condition, and the defendant not have the emblements, and take advantage of his own wrong.

CURIA. The proviso could only operate during the continuance of the lease. When that was determined, the proviso was at an end; and the plaintiff, never having been in possession, by right of re-entry, for the condition broken, can have no advantage thereof: the defendant therefore who ploughed and sowed the land, has in law and justice a right to reap and take the emblements.—Judgment for the defendant.

It is a general principle, clear and indisputable, that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither illegal nor unreasonable. Therefore, a *proviso* in a lease, that "if the lessee do any act, upon which a commission of bankrupt may issue, the lessor shall have a right to re-enter," was deemed a legal, operative condition, in the case of *Hunter v. Galliers and others*, assignees 1 T. Rep. 131. of *Green*. In that case a special verdict was found, stating (among other material facts), that *Hunter*, being seised of the premises, demised them by lease, to *Green*, for twenty years; provided that if *Green* should commit any act of bankruptcy whereon a commission should issue, and be found bankrupt; or should make any composition with,

or make any assignment of his effects in trust for, his creditors ; it should be lawful for *Hunter* to re-enter, &c.

ASHHURST, J. Is this proviso contrary to any express law, or so unreasonable, as that the law will pronounce it to be void? That it is not against any positive law is admitted ; no case has decided it to be illegal. In the case of *Lord Stanhope v. Skeggs*, the court were divided in opinion on the question which arose there ; therefore that is no authority either way : but considering the ground of the difference, it is some authority in support of this proviso for the doubt arose on considering, whether a clause of restraint could operate upon executors, to prevent them from assigning land, which was expressly leased to the original tenant and his executors *eo nomine*, when that was the only mean by which they could exercise the trust. That doubt does not occur in this case, the question turning here on a different point. The proviso not being against any express authority of law, it remains to be considered, whether it be void or unlawful, as against reason or public policy. It does not appear to be against either. First, it is reasonable that a landlord should exercise his judgment, with respect to the person to whom he trusts the management of his estate : a covenant therefore not to assign is legal ; covenants to that effect are frequently inserted in leases, and ejectments are every day brought on a breach of such covenants. The landlord may provide that the tenant shall not make himself liable to any risk by a voluntary assignment, or by an act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally reasonable for him to guard against such an event as the present ; because one of the consequences of bankruptcy is, an assignment of the property into other hands. Perhaps it may be more necessary for the land

T. 21. G. 3.
B. R.
2. T. Rep. 134.

ed to guard against this latter event, as there is greater danger to be apprehended by him in this, than in the former case. Persons who are put into possession under commission, are still less likely to take proper care of the land, than a private assignee of the first tenant. Neither is there any reason of public policy to be urged against allowing such a proviso. It conduces to the security of landlords, which can never be urged as a ground of objection on that head. On the whole therefore I am of opinion, that this is a valid proviso; and the lease having been forfeited by the tenant becoming bankrupt, the lessor of the plaintiff is entitled to recover.

BULLER, J. The question lies in a narrow compass; whether the proviso be good in law. I cannot say whether any part of it may or may not be objectionable, with reference to the statutes concerning bankrupts. We are now to decide upon the construction of a proviso at common law, not on any statute. There is a great difference between them. Lord Chief Justice WILMOT took the distinction in a case before him in the common pleas, in which his lordship said, "where the question depends on a statute, *that* mows down all before it, acting like a powerful tyrant, who knows no bounds: but the common law operates with a more lenient hand; roots out that which is bad, and leaves that which is good." The question here is, whether the proviso be good according to the principles of the common law, as to that part of it on which the question arises, namely, the act of bankruptcy, which is the only point necessary to be considered? The case has been argued on the ground of inconvenience, because the possession of an estate on such terms, may, it has been said, enable a tenant to hold out false colours to the world. That however does not apply to the occupation of *land*: for a creditor would not rely on the mere possession.

possession of the occupier; he would, if he could, know what interest he had in it. Were he desirous of knowing that, he must look into the lease itself; where he would find the proviso, that the tenant's interest would be forfeited in case of bankruptcy. Stock upon a farm might induce credit; but will not govern this case. It has also been argued, as equivalent to a proviso, that the lease should not be seized under a commission of bankruptcy; the defendant's counsel having first supposed the lease to be granted absolutely for a certain term, and then that a subsequent proviso is added to that effect. Such a proviso would be bad, because repugnant to the grant itself; but here there is an *express limitation* that the lease shall be void on the lessee becoming bankrupt. The landlord in this case parted with the term, on account of the personal confidence which he reposed in his tenant; which is manifestly the case in all leases where clauses against alienation are introduced. The landlord probably relies on the tenant's honesty; or approves of his skill in farming, and thinks he will take more care of the farm than another, and has therefore a right to guard against the estate falling into hands which may not manage it so well as the original tenant. Suppose a lease be granted for twenty-one years on condition that the tenant so long continue *personally* to occupy the land; no objection can legally be urged against such a condition; for personal confidence is the very motive of granting the lease; and that is like the present case. Lord Stanhope's case does not apply to this. In the first place, the court were equally divided, and therefore the case has no authority. In mentioning this I do not mean even to insinuate, that the opinion I then entertained was right; but there is a great difference between the two cases. There the lease was granted to the tenant, *his executors and administrators*; they were to take as such, which gave rise to the doubt in that case: and

LORD MANSFIELD there said, the difficulty is, that as by the terms of the lease the executors were to take, the subsequent proviso that they should not assign, seemed repugnant to the grant itself. Again, that was not an husbandry lease for twenty-one years, like the present, but for forty years; and there may be great reason for a distinction between the two terms; for if such a proviso as this were inserted in *very long* leases, it would be tying up property for a considerable length of time, and be open to the objection of creating a perpetuity. But the principal ground is, that this is a stipulation not against law, nor repugnant to any thing previously stated in the lease, but merely against the act of the lessee himself, which I think was competent for the lessor to make.

GROSE, J. The question is, whether the landlord may not stipulate that he will let his land only to the tenant, or to such an assignee as *he* (the landlord) shall approve? I know of no authority which says such a stipulation is illegal. The defendant's counsel has called in aid the 21. Jac. 1. c. 15. but that has never been extended to lands. Inconvenience rather bears the other way; for this cannot be determined to be illegal on any principle, which would not equally affect leases which are every day granted in large towns, restraining assignments to persons exercising noxious trades;—trades which not only diminish the value of the house assigned, but also of the adjoining ones, belonging probably to the same landlord.—Judgment for the plaintiff.

AND in such cases, it was formerly holden that an *actual* entry should be made; because the title to the land accrued by the grantee entering. It was however settled by LORD MANSFIELD, long prior to the statute of 4. G. 2. c. 28. that, in such case, the GENERAL CONFESSION was sufficient, with-

750.
Salk. 259.
out Post, p.

out proof of an actual entry. And now, by that statute, "in all cases between landlord and tenant, where half a year's rent is in arrear, for which no sufficient distress can be found on the premises, and the landlord hath right by law to re-enter for the non-payment, he may, without any formal demand or re-entry, serve a declaration in ejectment, in the manner stated hereafter and, on proof of the above circumstances, shall receive judgment and execution, as if the rent in arrear had been legally demanded, and a re-entry made."

Sect. 2.

AND that "in case the tenant shall suffer judgment and execution in such ejectment, without paying the arrears and costs, or filing a bill in equity within six calendar months after execution, he shall be barred from all relief in law or equity, other than by writ of error; and the landlord shall hold the premises discharged from the lease."

4. Salk. 597.

BUT by sect. 4. of the same statute, which seems to have been only a declaration of what had been previously determined, "if the tenant, before the trial, pay to the landlord, or tender and bring into court, the arrears and costs, all further proceedings shall cease; and the tenant be relieved in equity, he shall enjoy the premises under the old lease, without obtaining a new one."

AND by 7. G. 2. c. 20. "where an ejectment is brought by a mortgagee, if the person who has a right to redeem, shall appear and pay to the mortgagee, or bring into court, the principal interest and costs, he shall be discharged from the mortgage; and the court shall, by rule, compel the mortgagor to reconvey, and to deliver up all deeds relating to the title." In the case of

Peirce v. Peirce, the question meant to be made was, whether a mere trustee could dispute the possession of his ^{3. Burr. 1893.} *cestuy qui trust*. The court, though they looked upon ^{2. Dougl. 721.} as a settled point, "that the formal title of a trustee ^{8vo. 1. T. Rep. 602.} should not, in an ejectment, be set up against the *cestuy qui trust*; because, from the nature of the two rights, ^{Ante,} the *cestuy qui trust* is to have the possession;"—yet, in this case, that was not the question; the lessors of the plaintiff not being trustees for the defendant, but for mortgagees.

AND if there be a mortgage and two bonds, which were *lien upon the estate*, the court will not permit a defendant ^{Barnes 177.} pay off the mortgage, without paying also the amount of the bonds. And such a case (*Felton and Ash*) was said not to be within the act. And in *Goodright v. Moore*, in *Id.* 76. ^{Id. 76.} moving cause against an application pursuant to the act, was requested that the prothonotary might be directed to make an allowance to the mortgagee for repairs; in answer to which the court said, "the rule must follow the words of the statute;" adding, "the prothonotary will make all just allowances and deductions."

AND where there are two or more mortgages, the court will not compel a redemption of one, without the rest. In *Kaye v. Soley*, the defendant (assignee of *Bowland*, a ^{2. Black. 716.} bankrupt) moved to stay proceedings, on payment of the principal, interest, and costs, due to the plaintiff on a mortgage of the premises in question. There were also two other mortgages from *Bowland* to *Kaye*, of different premises. This motion was to redeem the *first* mortgage only, on payment of principal, interest, and costs, under the statute. The plaintiff insisted that *all* should be redeemed, or none. The court therefore refused to compel redemption of the first mortgage only, and discharged the rule with costs.

2. Atk. 53.

1 T. Rep 755.

So in equity, if a prior mortgagee has a *puisne* incumbrance, a second mortgagee is not permitted to redeem the prior, without redeeming the *puisne* at the same time; for the legal estate is in the first mortgagee; which benefit the court of equity will not take from him, provided he has no notice of the second, at the time he bought in the *puisne* one. And upon the same principle it has been determined that a second mortgagee who takes an assignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment, against the first mortgagee, notwithstanding he had notice of such prior mortgage. That was the point in *Norris and others v. Morgan and another*; in which case the plaintiff had a verdict, subject to the opinion of the court, on the following facts.—*R. Jones*, being seised in fee of the premises, namely, the manor of Penmarke and certain lands in Porthkerry, in Glamorganshire, by indenture of demise 14th April 1761, granted them to *Margaret Aubrey* for nine hundred and ninety-nine years, subject to a proviso for redemption, on payment of 5000*l.* and interest, at a day therein mentioned, which sum was not paid at the day. On 16th August 1768, by indenture of assignment, of four parts, between *Margaret Aubrey* of the first part, *R. Jones* of the second part, *John Lockwood* and *R. Morris* of the third part, and *Richard Lockwood* of the fourth part, *Margaret Aubrey*, in consideration of 719*l.* 14*s.* due to her from *Jones*, on the mortgage, and also on bonds, and which was paid to her by *Lockwood* and *Morris* by the direction of *Jones*, by the like direction of *Jones* and nomination of *Lockwood* and *Morris*, assigned to *Richard Lockwood* all the premises comprised in the indenture of 14th April 1761, to *Richard Lockwood*, his executors, &c. for the residue of the term, in trust, as to the manor of Penmarke, for *Robert Jones*, and in the meantime, to attend the inheritance, and as to the other lands in Porthkerry, comprised in the deed of 1761, in trust for

J. Lock-

Lockwood and Morris. By indenture of assignment, in December 1769, *Robert Jones* and *Richard Lockwood* assigned all the premises in question to *Richard Morland*, executors, &c. for the remainder of the term, in trust *Nathan Sprigg*, for securing 10,000*l.* lent by *Sprigg* to *es*. By indentures of lease and release, 14th and 15th December 1769, *Jones* mortgaged the premises in fee to *Sprigg* for securing the 10,000*l.* On the 9th of June 1777, *Sprigg* by his will appointed *Richard Morland* and *John Norris*, one of the lessors of the plaintiff, executors. *Morland* died, having appointed *Joseph Partington* and *J. Blagden Hale*, two other lessors of the plaintiff, executors. *Mary*, the wife of *Edward Jeffery*, the other lessor of the plaintiff, was heir at law of *Sprigg* the mortgagee. The two defendants, who defended separately for different premises, but which were all in mortgage to *Sprigg*, set up mortgages in fee from *Robert Jones* PRIOR to that of *Sprigg*. The defendant, *Joan Morgan*, claimed under a mortgage in fee of the manor of Penmarke, by *es* to *W. Morgan*, dated 3d and 4th of April 1767. The other defendant, *Richard David*, claimed under a mortgage in fee, of the lands in Porthkerry, by *Jones* to *es*, dated 27th and 28th July 1769. Both the defendants were in possession, by ejectment brought upon their several mortgages. At the time of the mortgage to *Sprigg*, all proper searches were made, on his part, for incumbrances, and he had all the title deeds that could be found, delivered to him at the time he advanced his money; except the lease of the 14th of April 1761, and the assignment of the 14th of August 1768, which were kept in the hands of *John Lockwood* on account only of their containing other premises in mortgage to *John Lockwood*; and which were not included in the mortgage to *Sprigg*, nor assigned to *Morland* his trustee, but counterparts of them were then delivered to *Sprigg*. The question for the opinion of the court

court was, whether the lessors of the plaintiff were intitled to recover the premises contained in the two mortgages set up by the defendants?

FOR the lessor of the plaintiff it was argued, that whenever a term is created for the purpose of raising money, and the mortgage is forfeited, the term will afterwards continue in the mortgagee, notwithstanding the mortgage money is paid. That the mortgagor may redeem in equity on payment of principal, interest, and costs; but still the legal estate continues in the mortgagee, and must be so considered in a court of law. Here the legal term was in *Morland* the trustee. The term was first created in *Aubrey* by *Jones*; continued in *Aubrey* till her mortgage was paid off, when she assigned to *Richard Lockwood* in trust for *Jones* to attend the inheritance; but still it was subject to the appointment of *Jones*, and he afterwards in fact assigned to *Morland*, in trust for *Sprigg*, under whom the plaintiff claimed. Terms *in gross*, and terms to attend the inheritance, at common law, are the same thing: as long as they exist, the owner of the soil is kept out of the legal estate. And though the use and benefit of the term are for the *cestuy qui trust*, yet the legal estate is in the trustee. It is no objection that such terms, if not at the events to attend the inheritance, will descend differently; the owner of the soil may sever them. The legal estate not being in *Jones* at the time of the mortgages to the defendants, and the trustee of the term not having joined in the conveyances, the defendants acquired no legal title. But that was afterwards conveyed by the deed of 13th December 1769 to *Morland*, in trust for *Sprigg*, under whom the lessors of the plaintiff claimed. And *Sprigg* had not merely a good legal title, but had also a good equitable title; he was a *bonâ fide* purchaser without notice in possession of the title deeds, and had an assignment of

the mortgage term. And the rule in equity is, that where there are several claimants in equal degree, the one who has the legal title shall be preferred. Where a mortgagee lends money on mortgage, he is party to a fraud, unless he takes the title deeds, because by those means he enables the mortgagor to mortgage the same estate to a subsequent mortgagee: and for that reason, a *puiſne* incumbrancer is permitted to obtain an outstanding term, and exclude a prior incumbrancer. Where a term is attendant on the inheritance, and the owner of the inheritance levies a fine, though the trustees of the term are thereby barred, and can never afterwards claim any thing, yet it might be set up to support incumbrances, and purchasers might protect themselves against prior incumbrances, by procuring an assignment of the term *pendente lite*.

For the defendants it was said, that when LORD HALE laid down the rule in the case of *Marsh v. Lee*, that a prior legal term outstanding should have the preference, courts of law were not so liberal in assisting equitable titles in ejectment; but it had been established since that time, that a legal term outstanding in a trustee should never be set up against the *cestui qui trust*. In *Bristow v. Pegge*, it *Post*, was held, that where a legal term was created for a particular purpose, if that purpose were satisfied, or if it were unsatisfied and not connected with the litigating parties, it should never be set up between them in an ejectment; but should be considered as if it had never been created. In the present case, this was a term attendant on the inheritance; and must be considered as belonging to and part of the inheritance; and, if separated in law, a court of equity would re-unite them. That *cestui qui trust* was the complete owner, and his disposition was the disposition of the land, and the trustee could be considered merely as an instrument of conveyance. Here the term was created in

in 1761; in 1768 the mortgage money was paid off, and the term assigned in trust for *Jones* and his heirs; to be disposed of as he should appoint, and in the mean time to attend the inheritance, and to protect it against *mesne* incumbrances. In 1767 *Jones* mortgaged to one of the defendants, and in 1769 to the other, both of them being prior to the mortgage under which the plaintiff claimed. At the times of the respective mortgages to the defendants the trustee of the term became the trustee of the defendants, and the term could not be separated from the inheritance without his consent: and if, previous to the conveyance to *Sprigg* in 1769, the defendants had brought ejectment upon their mortgages, neither *Jones* nor *Richard Lockwood*, his trustee, could have set up the term as a bar to the ejectments. Then if *Jones* himself could not set up the term, it were absurd to say that those who claimed under him could; for they could not claim a greater estate than he had. *Jones* having therefore parted with the inheritance, had no power afterwards to make an appointment of it differently. His power was gone, though it was collateral, by the conveyance of the land. With respect to the charge of fraud against the defendants, it was observed, that the mortgagor had alone been guilty of fraud, and though he could not be punished criminally for it, yet those who claimed under him, should not be benefited by it.

ASHHURST, J. No man ought to be so absurd as to make a purchase without looking at the title deeds; and he is, he must take the consequences of his own negligence. If the first mortgagee had used ordinary precaution, he must have known that this term was then outstanding; and if he did know of it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again.

this, therefore, he became *particeps criminis*, and must suffer for the consequences of the fraud; and the lessors, the plaintiff claiming under *Sprigg*, who have got the legal estate, must be preferred.

BULLER, J. It is an established rule in a court of equity, that a second mortgagee who has the title deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lends money upon mortgage without taking the title deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, it ought to be adopted in a court of law. Here the defendants took mortgages without entering after the title deeds; the subsequent mortgagee is a purchaser *without notice*; and, as he has taken the title deeds, has the better title.

GROSE, J. declared himself to be of the same opinion.

SEE also the case of *Willoughby v. Willoughby*, from the 1. T. Rep. 263. in the manuscript notes of Lord Chancellor HARDWICKE; in which it was determined, that if a *subsequent* purchaser or mortgagee has notice of a *former* purchase or incumbrance, shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference. If he had *no notice* of such *prior* purchase or incumbrance, he has the first and best right to call for the *legal* estate, and if he gets an assignment of it, a court of equity will not deprive him of his advantage. And that if a second mortgagee lend his money upon an estate, upon which there is an old outstanding term, and has notice at the time of a certain incumbrance prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances upon

upon the estate, although such other incumbrances were not known to the second mortgagee at the time he advanced his money.

AND if the trustees of a *public* turnpike act, not having any authority to mortgage the toll houses or gates, do, in fact, make such a mortgage, and an ejectment be afterwards brought by the mortgagee, they are *not estopped*, by the deed, from insisting that the act did not give them

- 2.T.Rep.169. a power: as in *Mytton and others v. Gilbert and others*. The defendants were nominated trustees under an act for repairing and widening a road. They were authorized by the act to erect turnpikes and toll-houses; the right and property of which, and all the materials, were thereby vested in them. Seven of them were enabled to *lease the tolls*; take up at interest any sum upon the credit of the tolls; and assign over and convey them to any persons who should advance their money thereon. No preference was to be given to the person lending money on the credit of the tolls, in respect of the priority of advancing such sum; but all persons to whom such mortgages or assignments should be made should be, in their several proportions, creditors on the act in equal degree one with another. The trustees, having occasion to raise a certain sum, advertised according to the act; and the lessors of the plaintiff having offered to supply them, mortgages were executed to them of the tolls and also of the toll-houses and toll-gates, by a sufficient number of the trustees, some of the defendants having joined in executing those conveyances. The ejectment was brought to recover possession of the toll houses and gates pursuant to the terms of mortgage to *Mytton*. At trial it was objected on behalf of the defendants, that the act did not warrant them to mortgage the toll-gates but only the tolls, for which an ejectment would not lie; and that the act expressly directed that no preference should

ould be given to any of the creditors above the rest; the judge, being of that opinion, nonsuited the plain-

A motion was made to set aside the nonsuit, on grounds. 1st, That some of the defendants, having acted in executing the conveyance, were estopped from making that objection. 2dly, That the toll-gates were a part of and appurtenant to the tolls, and virtually included in a grant of the latter.

ASHHURST, J. It is clear, that the trustees under the act had no power to mortgage the *toll-houses* or the *turnpike-roads*. The act expressly gives the trustees power to mortgage the tolls; the reason it does not give them a farther power is, because no creditor is to have a preference. Now if any creditor had a power to enter and take possession of the toll gates, he would gain a priority, which the act has denied. And it is very fit that this should not be taken out of the hands of the trustees; because they are trustees for all the creditors, and were considered by the legislature as the most proper persons to have the sole management of every thing to be done in pursuance of the act. It was foreseen, that the whole sum wanted could not be advanced by any one person; therefore, for the encouragement and security of all persons who were willing to advance money, it was necessary that the collection of the tolls should remain with the trustees. As the trustees had no power to mortgage the toll-houses, the next question is, whether they are estopped to say so? In general the party granting is estopped by his deed to say he had no interest: but that general principle does not apply to this case, where the trustees were not acting for their own benefit, but *for the benefit of the public*; and it would be hard that other creditors, who are not parties to the deed, should lose the benefit which the act has given them. There is a farther reason why the trustees should

should not be estopped; for the act, by a clause of it, to be deemed a public act of parliament, and the court bound to take notice, that the trustees under the act had no power to mortgage the toll-houses. This deed therefore cannot operate in direct opposition to an act of parliament, which negatives the estoppel.

BULLER, J. and GROSE, J. of the same opinion.
Rule discharged.

Co. Litt.
211. b.

As the plaintiff's right to enter often arises on a forfeiture, incurred by the non-performance of a covenant or condition, it need only, in general, be remarked, that the law uniformly leans against forfeitures, as courts of equity will always relieve against them; therefore, if the lessor accept rent of his lessee, after a condition broken, he cannot enter, nor consequently maintain an ejectment for breach of that condition; because he thereby affirms the lease to have continuance.

Crompton v.
Minsbull,
East. 33.G.2.
B. R.

So where the lessor brought an action of covenant for non-payment of rent, *subsequent* to the time of the demise laid in the declaration of ejectment, it was held that he had thereby waived his right of entry for the forfeiture, and acknowledged that the covenant subsisted.

Cowp. 243.

BUT the mere acceptance of rent, for an occupation *subsequent* to the time when the tenant ought to have been quit, according to notice given him for that purpose is not, *of itself*, a waiver of such notice; but a matter of evidence to be left to the jury, under the circumstances of the case; as in *Cohen v. Batten*. In that case, the defendant was tenant at will to the lessor, the plaintiff, who, to determine the tenancy, gave notice at Lady-Day, to quit at Michaelmas. The defendant

quitting at Michaelmas, the plaintiff brought his ejectment, and laid the demise on the 30th of September. The defendant appeared, and pleaded. Some time after the case was put in, the lessor of the plaintiff received of the defendant a quarter's rent, *due at Christmas*. The defendant's counsel insisted that the subsequent acceptance of that subsequently due, was a waiver of the notice, and tantamount to an agreement, that the defendant should continue tenant. LORD MANSFIELD said, he took the practice to be so; though in his own opinion it was unreasonable. But being settled, he directed the jury to find for the defendant; which they accordingly did. Afterwards, his Lordship said, he had turned the matter in his mind, and likewise mentioned it to the judges, who doubted if the law was, as he had directed. It was therefore proper the point should be settled; for which purpose he desired the counsel for the plaintiff to move for a new trial: which being done, and the case argued, the court gave judgment as follows.

LORD MANSFIELD. It was understood on all hands, at the trial, that there had been a generally-conceived notion and practice, that where a landlord receives rent for the occupation subsequent to the time when the tenant ought to have quitted, according to notice, it is an admission by the landlord, that he was his tenant after that time, and consequently a waiver of the notice. When the case was mooted at the trial, I did not think there were any cases against the practice, but looked upon it as established; and therefore directed the jury to find a verdict for the defendant. At the same time I was strongly of opinion, that the practice was unreasonable, and derogatory to justice. Now, upon examination, it does not appear, that we are precluded by authority, or any established practice, from judging agreeable to the reason of the case.

It being clearly proved, that a quarter's rent accrued since the demise, the question is, whether sufficient matter appeared, in point of law, to prevent the lessor of the plaintiff from recovering? If there did not, the objection I gave was wrong. First, if the matter which appeared ought to have been left as a *fact* for the consideration of the jury; in that point of view it was erroneous: secondly, if it be clear, that in law the lessor of the plaintiff was not barred, it was still more erroneous. An ejectment is a most beneficial remedy for the recovery of lands. It is a remedy by fiction of law; and should therefore be applied to the purposes which will best answer the ends of justice. In ejectment, the plaintiff in his declaration states, that on such a day he had title to the possession of such lands, and upon the trial is bound to prove that such title was *in him* at the time so specified. The title of the plaintiff in this case accrued by giving six months notice to the defendant, to quit which, it was in proof, had been duly given: indeed there is no dispute, but that at the time the demise is stated to have been made, the lessor of the plaintiff had a right to the possession; and so he had at the time of the plea pleaded. The single question is, whether the landlord has, by any *subsequent* act or agreement, *waived* such his right, and consented that the tenant should continue the possession? If he has, no doubt he will be bound by such agreement. As to that, the fact in this case is, that the landlord received rent, *eo nomine*, for a quarter of a year which became due *after* the time of the demise laid in the declaration. This circumstance, it is insisted, is, in fact, a declaration on his part, that he departs from the notice which he had given; and is an acknowledgment, that he still considers the defendant as his tenant. But let us suppose the landlord had accepted this rent, *under terms*, or made an express declaration, that he did not mean to waive

notice, and that, notwithstanding his acceptance or receipt of the rent, he should still insist upon the possession; suppose any fraud or contrivance on the part of the tenant in paying it; clearly, under such circumstances, the plaintiff ought not to be barred of his right to recover: *all these are facts which ought to be left to the consideration of the jury.* The question therefore is, *quo animo* the rent is received, and what *the real intention* of both parties was? If the truth of the case be, that both parties intended the tenancy should continue, there is an end of the plaintiff's title: if not, the landlord is not barred of his remedy by ejectment. As where the lessor of the plaintiff, after the demise laid in the demise, agreed to accept the single instead of the double rent, which by 4 G. 2. c. 28. he was entitled to. This very point was determined in a case at *Gilder or Gildeev. —* Salisbury assizes, 1754, before Lord Chief Baron SMYTHE, where the single rent had been received by the landlord subsequent to the time of the demise laid; and the objection now insisted on, was made: but the Chief Baron over-ruled it. A case was afterwards reserved for the opinion of the court of king's bench, when the court held it to be no bar; and that it ought not to preclude the plaintiff from recovering in ejectment. I entirely agree with that opinion. The statute gives double rent, if the tenant continues in possession after notice to quit. But all it is to be received *as rent*. What then is the case where a landlord accepts the single rent only? The taking of it, when he is entitled to an action for the whole, is an act of lenity; but does not import a consent, that the tenant shall continue in possession, or a waiver, by the landlord, of his remedy by ejectment. Another case was decided at Launceston assizes, when Mr. JUSTICE GOULD was of the Bar. The objection taken in that case was, that the lessor of the plaintiff, in ejectment, had likewise

brought an action for the use and occupation of the very same premises, for rent, which had *accrued subsequent* to the time of the demise. This action stood ready for trial at the same assizes. In arguing the objection which is now made, it was said that the action was an action founded on promises, and a supposed permission by the plaintiff to the defendant to occupy, therefore an acknowledgment on the part of the plaintiff, that he was his tenant; consequently, a waiver of his notice. But the objection was over-ruled; and the plaintiff recovered, first in the ejectment, and afterwards in the action for use and occupation. It was holden, that one of the remedies was not a waiver of the other. Why? Because they were brought for several demands, to both of which the plaintiff was entitled; consequently, the one could be no waiver of the other; for after recovery of the possession, the plaintiff was entitled to the profits for use and occupation, and he thought fit to sue for them. Therefore, in point of law, the mere acceptance of rent is not in itself a bar. But if there were a doubt whether the possession was by fraud, or in consequence of a new agreement, or whether the acceptance of rent was mutually intended or understood as a waiver of the notice, that is a fact which ought to be left to the jury to determine. It was not so in this case; and therefore I think there ought to be a new trial.

Aston, J. There is no doubt, but that at the time of the demise laid, the lessor of the plaintiff had a clear right to the possession. The question is, whether he has done any subsequent act which amounts to a waiver of that right? The only act which appears is, the acceptance of a single quarter's rent, accrued since. I think that is only a waiver of his right to double rent under the

st. 4. G. 2. and does not necessarily imply a consent that the tenancy should continue. Where an ejectment has been brought on the stat. 4. G. 2. c. 28. sect. 2. for the forfeiture of a lease, half a year's rent being in arrears, and no sufficient distress on the premises; there, acceptance of rent afterwards by the landlord, has, I believe, been held a waiver of the forfeiture of the lease; which may well be; for it is a penalty, and by accepting the rent, the party waives the penalty. But this case is very different: for here the acceptance of single rent, is only a waiver of his right to double.

ASHHURST, J. Whether the acceptance of rent after the time laid in the demise, is or is not a waiver of the forfeiture, depends on the intention of the parties; which is a matter of fact, and therefore to be left to the jury. If the landlord accepts it only as a compensation for the double rent, which the statute says he shall have a right to, it is a waiver of that only: but does not waive his right to the possession of the premises, which is entirely distinct and different thing.—A new trial granted.

THE case tried at Launceston assizes, which was cited by LORD MANSFIELD, in *Cheney v. Batten*, has since, by the luminous living authority, been somewhat questioned.

JUSTICE BULLER, in the elaborate judgment which he gave in *Birch v. Wright*, after stating the case alluded to, said, "This at best is but a *nisi prius* determination; and I can find no principle whatever on which to support it, to the extent to which it goes. If the plaintiff recovered only in the action for use and occupation, to the time of the demise in the ejectment, which he might do, notwithstanding his declaration claimed the rent to a later period, I think the case is good law. But if he recovered rent due after the demise, I cannot give

See also
1. T. Rep. 379.

"my assent to it. For the action for use and occupation is founded on contract; and unless there were a contract either express or implied, the action could not be maintained. And if there were a contract subsisting at the time of the demise, the ejectment could not be maintained. The action for use and occupation, and the ejectment, when applied to the same time, are tally inconsistent; for in one the plaintiff says the defendant is his tenant, and therefore he must pay him rent; in the other, he says, he is no longer his tenant and must therefore deliver up the possession. He can not do both."

Cro. El. 3.

WHICH opinion of MR. JUSTICE BULLER, if it stood in need of any support, is sanctioned by *Green's* case. In that case, a prebend let land to *Green* for years, rendering rent, with a re-entry for non-payment; the rent was demanded, but not paid, and two days after the lessor received the rent of him, and maketh him an acquittance by the name of *his fermor*; and if this receipt doth bar him of his re-entry, was the question. And it was clearly resolved, that the bare receipt of the rent after the due was no bar; for it was a duty due to him; but a distress for the rent, or a receipt of the rent, due at another day was a bar; for those acts do affirm the lessee to have lawful possession; so if he maketh him an acquittance with recital that he is his tenant; and in this case, by calling him "*his fermor*," this is a full declaration of his meaning to continue him tenant; and it was adjudged that the entry was not lawful,

Co. Lit. 211. b.
23. a.

BUT a distress for rent which accrued after the expiration of a notice to quit, has been deemed a waiver of the notice; being an express confirmation of the tenancy an act not to be qualified; and of course no question of intention

ention to be left to a jury. This was determined in *H. Black. 1. v. 311.*
Tard v. Willingale, which was an ejectment, in which the

aintiff was nonsuited on the following circumstances,

In September 1787, the lessor of the plaintiff purchased the premises in fee, then occupied by the defendant, who continued tenant from year to year, and to whom the lessor of the plaintiff, on 19th March 1788, gave the following notice to quit: "I do hereby give you notice to quit and leave the possession of all that messuage or tenement, &c. which you hold under me, &c. at Michaelmas-day next, &c." The defendant not having

obeyed in pursuance of the notice, on the 24th of February 1789, the lessor of the plaintiff distrained for a year and a quarter's rent, due at Christmas 1788, viz. for the year ending at the expiration of the notice to quit, and the quarter from that time to Christmas, during which the defendant held over. The demise was laid on the 1st of January 1789, and the question was, whether the distress taken for rent accrued *subsequent* to the time when the defendant had notice to quit, was not a waiver of the notice?

A RULE was obtained to shew cause, why the nonsuit should not be set aside, and a verdict entered for the plaintiff, or a new trial granted.

On shewing cause, it was contended that the lessor of the plaintiff could not recover, having, by taking a distress, affirmed and continued the tenancy, which he had before admitted by the terms of the notice; and that, though the mere acceptance of rent had been holden not to be of itself a waiver of the notice, but to be a question for the jury, whether it was the intention of the parties, that such acceptance should be a waiver or not; yet in the present case no such question could arise, the distress

being a direct acknowledgment, that the tenancy continued.

LORD LOUGHBOROUGH. There could be no question of intention left to the jury; the taking of the distress was an act not to be qualified, and an express confirmation of the tenancy,

GOULD, J. In the mere acceptance of rent, the *quæ animo* is to be left to the jury; but the distress in this case was an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J. I am of the same opinion. In *Cherry Batten*, there was a design to deceive the landlord, and a question, I remember, was made, whether he should be bound by the terms of the receipt in which the money was called rent, for that direct purpose; which was the ground of **LORD MANSFIELD** saying, that the question *quæ animo* should be left to the jury. The mere acceptance of money is equivocal; it may be in satisfaction for the trespass, or it may be for rent: and in an action of trespass for mesne profits, accord and satisfaction may be pleaded in bar, if rent has been accepted. There would be no doubt, but that the plaintiff would not have been precluded by taking a distress, if instead of the year and a quarter, it had been only for rent due at Michaelmas; because the statute says, that a distress may be taken within six months after the determination of a lease, provided the interest of the landlord and the possession of the tenancy continue; the law in this respect being altered since the time of **LORD COKE**, when the old notion prevailed, that a distress could not be taken, unless the same relation subsisted between the parties.

8 Ann. c. 14.
s. 6. and 7.

AND acceptance of rent, after a condition broken, with notice, has been held to be a waiver of the forfeiture. In *Walter v. Davids*, the plaintiff declared on a demise *Cowp. 303*, from Philip Walter, dated 30th September 1776, to hold from the 29th of September then last, for ten years. At the trial of the cause, it appeared that the lessor of the plaintiff, by indenture of 26th July 1762, demised the premises to the defendant for forty-one years, if the lessor should so long continue rector of the parish of Rayford. Among other things contained in the indenture, was a covenant that the defendant should not underlet, assign, or transfer the premises, or any part thereof, without consent of the lessor in writing, under his hand and seal first had and obtained; with a power of re-entry to Walter, in case the defendant should not observe the covenants. It further appeared, by receipts produced and parol evidence, that the defendant had under-let various parts of the premises in question, to several tenants for some years; but that the plaintiff's lessor knew of such under-lettings, all which were previous to Michaelmas 1775. The last receipt for rent paid by the defendant, was dated March 25, 1777, "for rent due at Michaelmas preceding." The letting to the under-tenant of the defendant, was before Michaelmas 1775, and continued at the time of the ejectment brought. A verdict was found for the plaintiff, subject to the opinion of the court on the following questions: whether a forfeiture was incurred by the under-letting? and if it was, whether it had been waived?

LORD MANSFIELD. This case is extremely clear. To construe this acceptance of rent, due *since* the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter: he had

had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued; which then he meant the lease should continue. Cases of forfeiture are not favoured in law; and where the forfeiture is waived, the court will not assist it.

BUT receiving rent *after* a forfeiture, is no waiver, unless the forfeiture was known to the lessor at the time which was one of the points determined in *Gregson v. Harrison*. In that case it was stated, that *William Gregson* by indenture in 1774, demised the premises in question to *Samuel Harrison* for twenty-one years, with a proviso that "in case *Harrison*, his executors or administrators should at any time, during the term, let or assign over the demised messuage, or any part thereof, without the licence of *Gregson*, his executors, administrators, or assigns, the indenture, and every thing therein contained should be void; and *Gregson* might enter, &c." The lessee entered, and died; the defendant took out administration, and became possessed of the premises. By indenture, dated 13th November 1786, the defendant, administratrix of her husband, demised the premises to one *Pilling*, to hold from 24th December then next, for nine years, at the yearly rent of 34*l.* *Pilling* entered, and was in possession. *Gregson* died, having, on the 20th October 1787, made his will, whereby he devised the premises to the lessor of the plaintiff, who brought the ejectment to recover the demised premises, as being forfeited by the demise to *Pilling*. The defendant proved, that previous to 10th October 1786, *Gregson*, under whom the lessor claimed, gave liberty by *parol* to *Harrison*, the tenant, to let the stables, part of the premises demised, but refused to give the like liberty to demise any other part of the premises. On the 2d January 1787, *Gregson* received of *Sarah Harrison* 6*l.* 10*s.* for a quarter's rent due the 25th

BY EJECTMENT.

97

December preceding, and gave a receipt in the following words, and with the following memorandum under

"2d January 1787, Received of *Mrs. Harrison* six pounds ten shillings, for rent due 25th December last, per me, *William Gregson*. No new tenants accepted without consent." The stable was at the distance of

yards from the dwelling-house: and formerly *Gregson*, the owner of the house, occupied the stable with the house.

For the defendant, it was insisted, that if any forfeiture had been incurred, it had been waived by the receipt of

rent; which had affirmed the tenancy of the defendant, subsisting at *Christmas* 1786. That even if the tenancy

were at an end by the letting, yet after acceptance of rent by the lessor of the plaintiff, the defendant, at least, be-

came tenant at will; in which case, notice was necessary before an ejectment could be sustained: but here no notice

was given.—*ASHHURST, J.* There is no doubt but that such a forfeiture as the present, may be waived by sub-

sequent acceptance of rent; but that only holds in cases where the party, at the time of receiving the rent, is cognisant

of the forfeiture; now here it does not appear that the lessor was cognisant of the forfeiture. The giving of the

receipt by the landlord for rent, subsequent to the time of the forfeiture, is indeed an acknowledgment of the

tenancy, but that is only where he knows the act of forfeiture at the time. That principle has been frequently

recognized, and the words at the bottom of the receipt import no notice of any actual assignment.—*BULLER, J.*

It has been established in many cases, that acceptance of rent shall not operate as a waiver of the forfeiture, or as

a confirmation of the tenancy, unless the landlord has notice that a forfeiture was incurred at the time. But

where it is not found that the lessor had notice of the forfeiture at the time of receiving the rent.—*GROSE, J.* or

the same opinion.

So,

Cowp. 451,
453.

So, on a lease, *void*, as against a remainder-man, the acceptance of rent by him, cannot amount to a confirmation of the lease. In general, a void lease is incapable of confirmation. As if a lease be *merely voidable*, acceptance of rent alone, unaccompanied with other circumstances, is not a sufficient confirmation of the lease; for, it cannot operate as a confirmation, unless done with a knowledge of the title at the time; or unless the remainder-man lies by, and suffers the tenant to expend money in improvements, in confidence of continuing the possession.

Black. Com.
2. v. 147.
2. Black, Rep.
1173.

Id. 1172.
Throgmorton
v. Walsdale,
B. R. Hil.
9. Geo. 3. and
1. T. Rep. 59.
Cowp. 422.

WHERE the tenant holds the premises of the lessor of the plaintiff, it is sometimes necessary to give him notice to quit possession, in order to maintain an ejectment. Here we may observe that demises, where no certain term is mentioned, are held to be tenancies from year to year, which neither party can determine, without reasonable notice to the other. This notice should be six months, or half a year, *preceding that part of the year when the tenancy commenced*; and therefore **HALF A YEAR'S** notice, to quit possession, must be given to such tenant, before the landlord can maintain an ejectment; unless the tenant has attorned to some other person, or done some act disclaiming to hold as tenant; in which case no notice is necessary.

THE cases which sanction this principle, are not numerous, but of importance to that branch of the profession, who are generally, and that too often on the spur of the occasion, called upon to advise on the propriety of giving the notice alluded to; the non-compliance with which on the part of the tenant, affords to the landlord a legal right to enter, and obtain possession by the medium of the action of ejectment.

IN the case of *Walker v. Constable*, it was said by the 3. Will. 23. whole court, "it has not been doubted of late years" and so it was resolved in that case), "that half an year's notice to quit possession must be given to a tenant at will; before the end of which time an ejectment will not lie to turn him out of possession."

AND in *Detbik v. Saunders*, it is said, that by the custom 2. Sid. 20. of London a tenant under forty shillings rent, being tenant at will, shall not be turned out without a quarter's warning; and a tenant at will, paying above forty shillings per ann. shall not be turned out without half a year's warning.

So the executor of such a tenant must have the like 1. Black. 306. notice. That, it should seem, was determined in *Tasler* 3. Will. 23. *Burr*; where (according to the loose report of the case) *A.* demised to *B.* from year to year, commencing 10th of October. *B.* died 27th August. *A.* 29th September, gave notice to the executor to quit, at the end of the term. The court held, that, in a common case, it would not be sufficient notice; but in the case of an executor, they doubted. LORD MANSFIELD, however, inclined strongly, that the nature of the contract being to hold from year to year, unless reasonable notice was given on either side, and notice not having been given in reasonable time) the executor was bound to keep the farm, if required, another year; and therefore was at liberty to keep it.

It cannot now be doubted, that all the inconveniences which might arise between the original parties themselves, and against which the wisdom of the law has endeavoured to provide, by raising the implied contract, exist equally in the case of their personal representatives: therefore in the case of a tenancy from year to year, as long as both parties

3.T.Rep.13.

parties, please, if the tenant dies intestate, his administrator has the same interest in the land which his intestate had, and may even declare in ejectment, as on a term for years. As in *Shore v. Porter*, which was an ejectment on the demise of *John Shore*, administrator of *William Shore*. The demise was laid to commence from the first of March in the 27th year of the reign, &c. to hold for seven years, &c. At the trial, the plaintiff produced one *William Shore* as a witness, who gave evidence as follows: "The premises did belong to me. I granted a lease to the defendant; *William Shore* was under-tenant to him; he paid me the rent reserved by *Porter's* lease two or three times: he paid to Lady-day 1786. *William Shore* died the 31st of October 1786. *Porter* accepted the deceased as his tenant on my recommendation. *Porter* paid me rent while the deceased was in possession, and told me I need not take the trouble of coming over to him, but receive the rent of the deceased. The deceased came in, in the summer of 1780; my rent was due every Lady-day." The plaintiff also proved the letters of administration duly taken out. To this evidence the defendant demurred, and the plaintiff joined in demurrer.

In support of the demurrer, it was contended, that the lessor of the plaintiff had not such an interest as would support a demise for seven years; and as no lease in writing was produced from the defendant to the intestate, and no duration of the demise given in evidence, it should be taken as a *parol* demise, and that the intestate was only tenant from year to year. It was material then to consider, what interest the administrator of a tenant from year to year had. Either it must be to the end of the current year, or at most during such time only as the intestate had an indefeasible interest; which could not, at any rate, extend beyond the subsequent year. For the administrator

strator holds entirely *in autre droit*, and not as assignee of the term. It was also unreasonable, that an administrator should have any other interest, than the indefeasible interest which the intestate had at the time of his death; for if he does not enjoy the property beneficially, he cannot be charged as assignee, but merely as administrator, consequently cannot be charged at all if he has no asset. Besides, a considerable time might elapse between the death of the intestate and taking out administration; during which it would not be in the power of the landlord to give notice to quit. Then the question is, whether, in ejectment brought by a tenant against his landlord, the demise can be laid for a longer term than the tenant has in the premises? Here the lessor had no possessory right in the premises, the indefeasible interest of the intestate, which alone could descend upon him, being expired. And as to the reason of the thing, to support the action, the plaintiff ought to be entitled to all the consequences which would result from a recovery; he should therefore be entitled to the possession, during the term declared for; which he was not in this case. The lessor, if he succeeded, would be in a better situation than if he had declared upon his own title. He might take out execution at any time during the term; and be entitled to damages, during the whole of that time, in an action for mesne profits: for in such an action there were only two objects of enquiry; the length of the term, and the value of the premises. *Burr. 665.*

LORD KENYON.—The lessor of the plaintiff, who is administrator of *William Shore*, claims as tenant from year to year, the property which is the subject of this ejectment. The first question is, what title is proved to have been in *William Shore* at the time of his decease, by the evidence adduced on this record? And I think that the only inference

fence to be drawn from it is, that he had *that* interest which his administrator says he had, namely, a tenancy from year to year, so long as both parties pleased. As between the original parties, as long as both of them lived, he could not have been dispossessed without six months notice, ending at the expiration of a year. But it is argued, that though this was the interest which *William Shore* had, a different interest devolved on his personal representative. On this question I do not know how to state a doubt. For this was a *chattel interest* from year to year, as long as both parties pleased; and it seems clear to me, that whatever chattel the intestate had, must vest in his administrator, as his legal representative. That it is supposed, that some inconveniences may result from such determination; but I see none: and many inconveniences might attend a different decision. The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. In order to obviate them, the courts very early raised an implied contract for a year, and added, that the tenant could not be removed at the end of the year, without receiving six months previous notice. And all the inconveniences which arise between the original parties themselves, and against which the wisdom of the law has endeavoured to provide, by raising the implied contract, exist equally in the case of their personal representative. Then is there any objection in point of form against the plaintiff recovering in the ejectment? The interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration in ejectment; *the whole of which is an absolute fiction*. And this fiction does not even affect the case of an action for the mesne profits. Therefore I am of opinion, that there is no ground for either of the objections.

ASHHURST, J. BULLER, J. and GROSE, J. concurred.

AND though there be different takings at different times, yet if the rent be payable at the *same* time for the whole, the notice may be given accordingly; as in *Dogget* and *Black*. 1114. *nowdon*. In that case, on 5th *October* 1769, a memorandum was entered into, whereby the plaintiff agreed to let to the defendant a farm, to hold the arable from 1st of *February* then next, the pasture from 5th of *April*, and the meadow from 12th of *May*, for seven years, from the said days and times, at the yearly rent of 26l. payable half yearly at *Michaelmas* and *Lady-day*: the defendant was to have the privilege of a waygoing crop of three parts of the arable ground, after the expiration of the term; paying at the rate of 13s. an acre for the same, and consuming the same on the premises. The defendant occupied the farm, and continued, as tenant, after the end of the term. On the 30th of *September* 1777, plaintiff gave defendant a written notice to quit the arable land on the 13th of *February*, the pasture on the 5th of *April*, and the meadow the 12th of *May*; which notice was dated the 29th of *September* 1777.

For the defendant it was argued, that this was not a sufficient notice for any part, the whole being one entire tenancy; that therefore the notice to quit ought to have been given on the 13th of *August*, being six months previous to the time when the first part of the term expired.

THE court said, the notice was sufficient for the whole; and, as it has been settled by all the judges, to avoid diversity of opinions and for general convenience, that in tenancies from year to year (which these kinds of holdings are held to be) there must be six months notice on either side to quit, according to the antient law; except where there is a special agreement, or the custom of particular places, otherwise. The true construction of this agreement is,

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that

that it is a holding from Lady-day to Lady-day, old style; the rent being payable at Old Michaelmas and Lady-day. And though part of the farm is to be entered upon and quitted at Old Candlemas, February 13, and other part not till Old May-day, May 12, yet that is no more than the custom of most countries would have directed, without any special words for that purpose, in a taking from Old Lady-day, the 5th of April: viz. that the arable shall be entered upon at Candlemas, to prepare it for the Lent corn; and the meadow not till May-day, when in the northern countries they are usually heyed for hay. And if any inconvenience could have happened to the retiring tenant by this mode of quitting, it is sufficiently obviated in the present case by the clause which provides a waygoing crop for the tenant. Whereas great mischief might happen to the landlord, by requiring a notice to be given so early as the 13th of August, by giving room to the tenant to harrows and wear out the land, out of the usual course of husbandry, and particularly by taking a second crop of hay from the meadows.

STRICTLY, perhaps, the notice should not, *at to time*, be six months, but HALF A YEAR, ending at the expiration of the year; namely, at the time of year when the tenancy originally commenced; and that whether the subject demised be houses or land. These points occurred in

1. T. Rep. 159. *Flower v. Darby and another*. On the 11th of May 1781, *Darby* took a house, and occupied it under a parol demise, the rent to commence from Midsummer following. *Darby* let part of it to the other defendant *Brislow*. On the 16th March 1785, *Darby* was served with a notice to quit on the 29th of September following. The question was whether the rule, which requires that half a year's notice should be given to a tenant at will, before an ejectment can be brought, requires also that such notice should be

pire at the end of the year? For the plaintiff it was urged, that none of the cases require the notice to expire at the end of the year; but that it is sufficient if notice be given for the space of half a year, without reference to any particular period of the term. But if the rule was to prevail in any instance, still there was a great difference between land and houses. The same reasons which might induce the court to extend it to the former, were not applicable to the latter: for with respect to lands, there might be a hardship in suffering the landlord to oust the tenant in the middle of the year, by which he would be put to the inconvenience and expence of carrying the crops from off the premises. But no such reason could arise in the latter case, from the nature of the thing itself. On the contrary, more inconvenience would ensue, as well to landlords as tenants, from adopting the strict rule attempted to be imposed, than by giving half a year's notice to quit, without reference to any particular period.

For the defendant it was said, that what was formerly a tenancy at will, is now a tenancy from year to year; and such a tenant must, *ex vi termini*, hold for a whole year. Here the year ended at Midsummer: therefore the half-year's notice ought to have been to quit at *that* time. A case was cited of *Sykes* on the several demises of *Murgatroyd and Wilkes* v. —, before BLACKSTONE, J. at York summer assizes 1774; where *John Murgatroyd*, being seized for life, remainder to his wife for life, with remainders over, in 1772 agreed with the defendants to grant them a lease for fourteen years, to commence from 13th February 1772, at 14*l.* *per ann.* The defendants entered under that agreement; but no lease was granted. *Murgatroyd* died in July 1773. At the latter end of the same month, his widow gave the defendants a notice to quit on the 2d of February, and some time after made a lease

to the lessor of the plaintiff *Wilkes*, to commence on the 2d of February. Subsequent to this, she accepted half a year's rent from the defendants, which was due at Martinmas 1773. BLACKSTONE, J. seemed to think, that if no notice to quit had been given, the acceptance of rent would have been sufficient evidence of an agreement between her and the defendants, that they should continue from year to year; and therefore a notice subsequent to that acceptance of rent must have been a half-year's notice to quit on the 13th February: but the acceptance of rent was only evidence of such agreement, and rebutted by the notice; and therefore the plaintiff had a verdict. In another case before LORD MANSFIELD at Guildhall, one *Duncombe* brought an ejectment against a tenant, but could not prove from what time the term commenced: the tenant proving it to be different from the time to quit mentioned in the notice, the plaintiff was nonsuited. And in *Puddicombe v. Harris*, the demise was laid on the 30th March 1784; the plaintiff proved a receipt of rent from the defendant, and that he gave him six months notice to quit at *Lady-day* 1784. It was objected, that, supposing the defendant tenant from year to year, it was not proved that he was tenant from *Lady-day* to *Lady-day*; and so no tenancy was proved upon which a notice to quit could operate. But EYRE, B. said, that as the defendant had six months notice to quit at *Lady-day*, he should *presume*, that he was tenant from *Lady-day* to *Lady-day*, unless the contrary was shewn.

Dorchester
Sum. Aff.
1784.

1. T. Ref. 54. LORD MANSFIELD. When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprized of the determination of the term. If there be a lease for a year, and, by consent of both parties, the tenant continues in possession afterwards, the law implies a tacit renovation

of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary, for the sake of convenience, that if either party be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year. Now this is a notice to quit in the middle of the year, therefore not binding, being contrary to the agreement. The case of lodgings depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month, or less time; and there shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole depends on the nature of the first contract.

ASHHURST, J. There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary both should be governed by one law. There may be cases where the same hardship would be felt, in determining that the rule did not extend to houses, as well as lands; as in the case of a lodging-house in London being let to a tenant at Lady-day, to hold as in the present case. If the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term; since it is notorious, that winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J. It is taken for granted, by the counsel for the plaintiff, that the rule of law, which construes what was formerly a tenancy at will, of lands, into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after

that time, it is a letting from year to year. This reason extends equally to the present case. An annual rent is here reserved; and upon such a holding it has been determined, that half a year's notice to quit is necessary. This doctrine was laid down as early as the reign of Henry the eighth. The moment the year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection, on the distinction between *six months* and *half a year*. The case in the Year-Books requires half a year's notice; here there is less than half a year's notice; it is therefore bad on that ground also.—Judgment for the defendant.

1. T. Rep. 54.
159.

Bury Affizes,
1775.
1. T. Rep. 162.

14. 95.

1. H. Black.
97.

Id. 8.

and see

1. Black. 1225.

1. T. Rep. 162.

WHERE, however, a term is to end on a precise day, there is no necessity for a notice to quit; because both parties are apprized, that unless they come to a fresh agreement (express or implied), there is an end of the contract between them. For after the expiration of a lease for a certain term, the tenant, continuing in possession, is deemed a trespasser; an ejectment, therefore, which is an action of trespass, may be brought without any notice to quit. So, on a *void* lease. But if the lessee, after the expiration of the lease, holds over and pays rent, the court will *presume* an agreement between the parties, *viz.* that the tenant shall continue the possession, according to the terms of the original demise; in which case, if the landlord wishes to determine the tenancy, he must give the tenant *notice to quit*, according to the time of the original taking. This is evident, not only from the case of *Jordan v. Ward*, but from many other cases. In that case, one *Jordan* was tenant for life, remainder to his son the lessor of the plaintiff. *Jordan* the father, on 22d June 1785, made a lease of the premises to the defendant for 21 years, to

commence from *Old Lady-day*, the 5th of April then past, when the defendant entered. On 30th September 1785, the father died; on whose death, the estate came to the lessor of the plaintiff. The defendant continued in possession, and paid rent to the lessor of the plaintiff, after the death of his father, for two years together, on *Old Lady-day* and *Old Michaelmas-day*. Before *Old Michaelmas-day* 1787, the lessor of the plaintiff gave defendant notice to quit on *Old Lady-day*, the 5th of April then next; and, on his refusing to quit, brought his action.

An objection was made at the trial, that the notice to quit on the 5th of April was bad; inasmuch as it ought to have been on the 30th of September, the end of the year, dated from the death of *Jordan* the father; all the defendant's interest derived from the lease having ceased on that event, as the father had no power to make a lease to endure beyond his own life.

ASHHURST, J. who tried the cause, left it to the jury, whether they would not presume a new agreement between the lessor of the plaintiff and the defendant, that he should continue to hold according to the terms of the original lease; as the lessor of the plaintiff had received rent during two years, after the death of his father, on the original days of payment, namely, *Old Michaelmas* and *Old Lady-day*; if so, the notice to quit was proper. But a verdict was found for the defendant. A rule was granted to shew cause why the verdict should not be set aside, and a new trial granted.

LORD LOUGHBOROUGH. The jury found a wrong verdict. The notice to quit on the 5th of April was proper, as payment of rent had been made on that day. It was also fair and just in the lessor of the plaintiff,

to give the tenant notice to quit when his year ended, that his course of husbandry might not be disturbed.

HEATH, J. The defendant was tenant at sufferance, on the death of tenant for life; and the rent being paid on the 5th of April, was evidence of an agreement to hold from that day.

WILSON, J. As there was no express agreement between the lessor of the plaintiff and the defendant, relating to the premises, given in evidence, we must collect what their agreement was, from something done by them. The payment of rent by one, and acceptance of it by the other, on the same day on which the defendant originally entered, was sufficient evidence of a relation back between them; and though the indenture itself was made on the 22d of June, it related back to the 5th of April. Although the title of the defendant under the indenture ended on the 30th of September, yet payment of rent on the 5th of April, was evidence of an agreement that he should continue to hold in the same manner as he did by the indenture; insomuch that if in the lease, there had been covenants for particular modes of husbandry, and defendant, after the death of tenant for life, had neglected to perform them, the lessor of the plaintiff might have maintained an action on the case against him; stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease; of which agreement, the continuing to pay rent on the 5th of April, for two years together, would have been good evidence.

1. H. Black. 8. It has been often determined, that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions

tions and covenants of the lease: and if, by *tacit* consent the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract, must also be continued. Nay, if the original agreement was void, as to the duration of the term, yet if a tenancy subsists in other respects, the tenant must have the usual notice to quit; or the landlord cannot legally intitle himself to the possession: as, in *Riggs v. Bell*, it appeared that in January 1790, an agent for the lessor of the plaintiff let the farm in question to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the 1st of May at old Lady-day, and the house on the 15th of May following; and was to quit at *Candlemas*. The defendant entered accordingly and paid rent: the notice to quit was given at *Lady-day*. It was objected, that the notice to quit was insufficient; the holding being from *Candlemas*, and the notice requiring defendant to quit at *Lady-day*.

5. T. Rep 471.

LORD KENYON, Ch. J. Though the agreement be void by the statute of Frauds, as to the duration of the lease, it must nevertheless regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now in this case it was agreed, that the defendant should quit at *Candlemas*; and though the agreement be void as to the number of years for which the defendant was to hold, if the lessor chuse to determine the tenancy before the expiration of seven years, he can only put an end to it at *Candlemas*.

Doug. 21.

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Bell v. v.
Caldwell.

THE case of a mortgagee is, under some circumstances different: as for instance, a mortgagee may recover ejectment, *without* giving any notice to quit, against a tenant who claims under a lease from the mortgagee granted *after* the mortgage, without the privity of the mortgagee; which point was agitated in the case *Keach v. Hall*.—LORD MANSFIELD. This is an ejectment brought for a warehouse in the city, by a mortgagee against a lessee, under a lease in writing for seven years made *after* the date of the mortgage, by the mortgagee who had continued in possession. The lease was at a rack rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; that though the written lease should be bad, if the lease is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, is for the court to decide, is, whether by the agreement and *road* between mortgagors and mortgagees, which is that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let, from year to year, at a rack rent, or whether he may not treat the defendant as a trespasser, disseisor, and wrong-doer. No case has been cited where this question has been agitated, much less decided. The only case like the present is one which was tried before me; but there the mortgagee was *privity* to the lease, and afterwards by a knavish trick, wanted to turn the tenant out. I do not wonder such a case has not occurred before. Where the lease is not beneficial, it is for the interest of the mortgagee to continue the tenant; where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do so.

the idea that the question may be more proper for a court of equity, goes upon a mistake: it emphatically belongs to a court of law, in opposition to a court of equity; for a lessee, at a rack rent, is a purchaser for a valuable consideration; and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead the law. On full consideration, we are all of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. If the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but where the question turns upon the agreement between the mortgagor and mortgagee. When the mortgagor is left in possession, the true inference to be drawn is, an agreement that he shall possess the premises *at will*, in the strictest sense, and therefore *no notice* is ever given him to quit; he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, in payment of which, the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases, Doug. 279. not subject to every circumstance of the mortgage. If by implication, the mortgagor had such a power, it must go to a great extent; to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance; It does not induce a belief, that there is no mortgage; for the nature of the transaction is, that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should enquire after and examine the title-deeds. In practice indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore, potior est jure*. If one must suffer, it is he

See 4. Ann.
c. 16. s. 10.
Com. Dig. tit.
"Estate."

he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the profits, from the tenant, in an action of trespass; which would be a manifest injustice, as the tenant would then pay the rent twice. I give no opinion on that point, but there may be a distinction; for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, but he determine his will. As to the lessee's right to reap the crop, which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but however that may be, it could be no bar to the mortgagee recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop, as to which, with regard to tenant at will, the text of *Littleton* is clear. We are all of opinion, that the plaintiff is entitled to judgment.

Ante, 23. 23.

THE like doctrine might, under similar circumstances, prevail in the case of a trustee; for, from the authority of *Estwick v. Way*, it seems to have been determined, that the trustee of a term for the benefit of creditors, (not having notice of an agreement for a lease, made previous to the grant of the term), may maintain an ejectment against the tenant in possession, under the agreement.

Doug. 269.

For some time, the courts of law most attentively regarded the interests of a mortgagee; and proceeded so far as to permit him to recover by ejectment, provided he had given notice to the tenant that he did not mean to disturb his possession, but only required the rent to be paid him, and not to the mortgagor. LORD MANSFIELD, therefore, approved of what had been formerly

Doug. 23.

done

by Mr. JUSTICE NARES, on the *Oxford* circuit, and afterwards confirmed by the court of king's bench, viz. to suffer a lessee, under a lease made prior to the mortgage, to avail himself of the lease, on an ejectment brought by the mortgagee; provided the mortgagee had, before the commencement of the action, given the tenant notice that he did not intend to turn him out of possession. In the "Introduction to the Law relative to Trials at *Nisi Prius*," a book of great celebrity in the Bull. Ni. Pri. profession, the case alluded to is stated with more accuracy. There it is said—"a mortgagee need not give notice to a tenant to quit, before bringing his ejectment, if he mean only to get into the receipt of the rents and profits of the estate, though the mortgage be made subsequent to the tenant's lease. But in such case he shall not be suffered to turn the tenant out of possession by the execution. In the present case, the lease was only from year to year, and, with respect to the last year, might be considered as a lease *subsequent* to the mortgage: but the court held it would have been the same, if the lease were for a long term."

Whalley, Warling, or White v. Hawkins,
Mich. 14. G. 3.

THOUGH this doctrine, after many years acquiescence, was deliberately confirmed by the case of *Bristowe v. Bristowe*, yet it has since been much shaken, if not altogether exploded, by the decision on the case of *Hodsdon v. Staple*. The plaintiff must recover on the strength of his own title, and of course shew a right to the possession; it would seem, therefore, that a mortgagee would not now be permitted to recover in ejectment against a lessee, though he mean not to turn him out of possession, but only to intitle himself to the receipt of the rents and profits, whose lease was granted *previous* to the mortgage.

If,

IF, however, there be tenant from year to year, and the landlord mortgages the premises while the tenant subsists, I should think, under the authority of *Burton v. Wright*, 1 T. Rep. 378, that if mortgagee wishes to obtain the possession, and of course to evict the tenant, he cannot legally obtain possession, without previously giving to the tenant half a year's notice to quit. Whilst he is tenant to the original landlord, he clearly is intitled to that notice before the end of a year, to quit, and cannot be turned out without it; he would therefore, I presume, be intitled to the same notice from a mortgagee, before he can be evicted; inasmuch as he must also claim under the original landlord, and cannot therefore, as to such tenant, be in a better situation than the mortgagor himself. He stands exactly in his place; with this difference, that his right to the possession is subsequent to that of the tenant.

EVEN an *infant*, who becomes intitled to the reversion of an estate, previously demised from year to year, cannot eject the tenant, without giving him the same notice which the original lessor must have done; for the tenant is not the less intitled to it, when the land comes to the reversioner, merely because he is so; the tenant must, in justice, stand in the same situation in which he stood before.

ON a motion for a new trial, the case depended on the terms of the notice to quit; the notice being—"I desire you to quit the possession, at Lady-day next, of so much or, I shall insist upon double rent for the same."—*Matthews v. Jackson*, Doug. 167. and see 1 T. Rep. 53. LORD MANSFIELD. That the landlord may give the tenant the alternative is clear; but the question is, what is the meaning of this notice? If it had really contained the option of a new agreement, and had said, for instance, "or else that you agree to pay double rent," the ejectment could not have been supported: but here the landlord does

es not mean to offer a new bargain. I think this very point has been settled several years ago; but if it be new, have no doubt. The additional words only prove the landlord's anxiety to get into possession. It is an emphatical way of enforcing the notice, and shewing the tenant that he is in earnest, by informing him of the legal consequence, if he hold over. The tenant may keep him out by defending an ejectment, and by chicane, for several months; but the notice informs him, that in such case the landlord will insist on the penalty. It clearly means to refer to the statute, although the penalty given by the statute is not double rent, but double the yearly value, which is more favourable to landlords; for double rent would be no penalty on the expiration of some leases.

WHEN the notice to quit is *in writing*, it is in general served either upon the tenant personally, or delivered upon the premises demised; neither, however, are absolutely necessary; for, if the service be on a servant of the tenant at his dwelling-house, though not on the demised premises, and the contents explained, it may be good. It is presumptive evidence that the master received it; and will operate conclusively, unless the servant be produced to prove that it was not communicated to the tenant. Such was the determination in *Griffiths v. Marsh*. It ^{4 Term Rep.} appeared that the notice had been served on the defendant's ⁴⁶⁴ servant at his house, which was not situated upon the demised premises, and the contents explained to her at the time: but there was no evidence that it ever came to the defendant's hands, except as above. As this notice was to determine an interest in land, it was objected that it was not sufficient.

LORD KENYON.---This is different from the cases of personal process; but even in the case of service on the wife,

wife, I do not know that it is confined to service on her on the premises. I believe if it be served on her in the house, it is sufficient. But in every case of a service of notice, leaving it at the dwelling-house of the party, has always been deemed sufficient. So wherever the Legislature has enacted, that before a party shall be affected by any act, notice shall be given to him, leaving that notice at his house is sufficient. So also in the case of an attorney's bill, or notice of a declaration being filed. And indeed, in some instances of process, leaving it at the house is sufficient; as a *subpœna* out of the court of chancery, or a *quo minus* out of the exchequer. In general, the difference is between process to bring the party into contempt, and a notice of this kind; the former of which need only be personally served.

BULLER, J.---*Ex concessis* personal service is not necessary in all cases. This notice was delivered to the tenant's servant at the dwelling-house of the tenant, and its contents explained at the time; and that servant, who was in the power of the defendant, was not called to prove that she did not communicate the notice to her master. This was ample evidence, on which the jury would have presumed that the notice reached the tenant.

AND if the taking be in general terms, as from *Michaelmas* to *Michaelmas*, and the notice be to quit on a particular day, parol evidence may be received to prove, that by the custom of the country, that day is the known expiration of the year. As in the case of the *Mayor, &c. of Canterbury v. Wood*, the tenancy was from *Michaelmas* to *Michaelmas*, and the notice was given on the 4th of March 1793, to quit on the 10th of October following. It was objected that the notice was insufficient, inasmuch as it ought to have been to have quitted either on *Michaelmas* generally, or on the 29th of September; to which it was answered, that by the custom

Kent Sum.
Ass. 1794.
cor. Lord
Kenyon.

custom of the county of *Kent*, such a general tenancy commenced and expired at *Old Michaelmas-day*, namely, the 10th of October; and *parol* evidence being given of that circumstance, the plaintiff had a verdict.

If, however, the notice be defective, the tenant is not bound to state his objection to it, at the time when it is served, but may reserve his objection, and insist upon it at the trial of the cause. In *Green v. Copons*, it appeared that the defendant held from *Michaelmas*, and that he was served with notice to quit at *Midsummer*; but, when he received it, made no objection that it required him to quit at that period, but merely said, "I pay rent enough already, and it is hard to use me thus." The defendant's counsel pressed for a nonsuit, on the ground that the notice should have been to quit at *Michaelmas*; to which it was answered, that the defendant had waived the objection when he received the notice, and ought not to be permitted to turn round the lessor of the plaintiff on such an objection. A verdict was taken for the plaintiff, with liberty to the defendant to move to set it aside, and enter a nonsuit, in case the court should be of opinion that the defendant was not precluded from making the objection. On the motion being made, the court were of opinion that the defendant had not waived the objection; and therefore made the rule absolute. BULLER, J. added, whether the defendant had or had not assented to be considered as holding from *Midsummer*, would have been a question of fact for the jury, if there had been any evidence on that point; but, so far from there being any evidence of such an assent at the time when he received the notice, his answer proved the reverse; it was the answer of an angry man.

4. Term Rep.

361.

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TROVER.

THOUGH, under the circumstances stated, notice must be given from the landlord to the tenant, and though from the usual prudent practice, (a practice founded in good sense, and which renders evidence *certain*, and *correct*), that notice is *in writing*, yet I know not of any authority which requires *that* precaution. It may, I presume, be given by *parol*; and necessity, under some circumstances, may justify such a notice: nothing however but necessity, can justify a deviation from the usual practice. That it may be given *by parol* is, in a great measure, if not altogether, authorized by the case of *Timmins v. Rowleson*,

1. Black. 533. which though not directly in point, is yet an analogous authority; deciding that a *parol* notice to quit, by a tenant, under a *parol* demise, is good within 11. G. 2. and will subject him to double rent, for not quitting in pursuance of it. The reason, that "landlords can usually write," and tenants cannot," does not merit a moment's consideration. Whether notice were given or not, must be the material fact between the parties; and whether given in writing, or by *parol* (provided it was given, and be substantially proved), cannot make any difference in the cause.

ON this head, more than enough, *perhaps*, has been stated; be it however remembered, that if the possession of the tenant be *adverse*, no notice to quit is necessary.

Cowp. 622.

As tenant *at will* cannot be deemed a trespasser, the tenancy must of course be determined before the day of the demise laid in the declaration, or the plaintiff cannot recover.

4. T. Rep. 680.

As for instance, in *Galloway v. Herbert*, it was agreed between the plaintiff and defendant, that the defendant should hold the farm from Michaelmas 1791, for four, eight, or twelve years, at a rent of 78l. *per annum*. No memorandum in writing was made, nor any lease executed.

cuted.

ted. The demise was laid on the 1st of October; though possession was not demanded till the 5th of that month, when it was refused. Some repairs were done by the tenant, in pursuance of the agreement, a few days after it was made. The jury found a verdict for the defendant, the plaintiff however had leave to move to enter a verdict for him, if the court should be of opinion, that the agreement did not, under the circumstances, intitle the defendant to hold the possession against this ejectment. A lease having been obtained for the purpose, it was opposed on two grounds. First, that the defendant had an *equitable* title, having made repairs under the agreement. Secondly, that he had a right to retain possession to a *subsequent* to the demise: for if the defendant was to be considered merely as tenant at will to the lessor, the lessor could not determine his will in the middle of a year. That by the statute of Frauds, all leases of land *parol*, have the effect of leases or estates at will only: the defendant then was tenant *at will*, consequently could not be a trespasser till the will was determined. Here the will of the lessor was not determined till the 5th of October; and yet the day of the demise was laid on the 1st of that month; the plaintiff therefore could not recover.—
T. Jones, 5. Salk. 413. 2. Black. 1171. 29. Car. 2. c. 3. f. 1. r. T. Rep. 378. 383.
MR. KENYON. The statute of Frauds says, that such agreement shall only have the effect of creating a tenancy at will. Now a tenant at will is not a trespasser, till the tenancy was not determined until after the day of the demise in the declaration; consequently the plaintiff cannot recover.—Rule discharged.

AND in the case of a running lease for years, as for *three*, or *nine* years, it is a lease for nine years, determinable at the end of the first three or six years, on giving reasonable notice to quit; as was determined in *Hall v. Richard-Aue*, 18.

3. T. Rep. 462.
and see
2. T. Rep.
329.

So if a tenant hold under an agreement for a lease whereby it is stipulated, that the agreement shall continue for the life of the lessor, and that a clause be inserted in the lease, giving to the son of the lessor power to take the premises to himself, when he should come of age, the son must not only make his election *within a reasonable time* after he comes of age; but if he delay it to an unreasonable time, he cannot avoid the contract, nor of course eject the tenant, though afterwards he give him half a year's notice to quit. Such was the case of *Bromfield*

*T. Rep 436. *Smith*. The plaintiff, *Mary Bromfield*, being intitled to an estate for life in the premises, entered into the following agreement with the defendant. "March 1778, Agreed with Mr. *Leaper Smith*, to let my house in the *Wardwick, Derby*, at the yearly rent of three guineas, he paying taxes; the above agreement to continue during my life, supposing it occupied by himself or a tenant agreeable to me: a clause to be inserted in the lease to give my son a power to take the house to himself, when he comes of age." In the month of March 1786, the son attained the age of twenty-one years, and by letter, dated 2d March 1787, addressed to his mother, requested her to give the defendant notice, on the ensuing *Lady-day*, to quit the house at *Michaelmas* following, he wishing to reside there himself. In pursuance of which request, on 16th March 1787, the plaintiff *Mary Bromfield*, gave the defendant notice to quit at *Michaelmas*; stating also, that her son, being of age, had signified his desire to take the house. A verdict was given for the plaintiff, subject to the opinion of the court. *Per CURIAM*. The only material question is, whether the son signified his intention of residing in the house within a reasonable time after he came of age? We are of opinion that he did not; for it was nearly a year before he made his election. We do not mean to say, that

was bound to elect the day after he came of age; but certainly he should have done so in a reasonable time; otherwise one party would be at liberty to avoid the agreement at any time, while the other would be bound by it. A year be not too much, why not a year and an half? Within a week or a fortnight, that would be reasonable. Without drawing the precise line, what shall be a reasonable time, it is enough to say, that the notice in this case was not given in reasonable time.

AND to evince the attention which is uniformly paid to the principle, that the plaintiff can recover only on the strength of his own title, it remains but to add, that if a lease be void in its commencement, or become so by any subsequent act of the lessor, the lessee cannot maintain an ejectment, even against a mere stranger, who enters without any title whatever. In *Cripp v. Barber*, the lessor claimed a T. Rep. 749. rectory house, &c. by lease from the rector for twenty years, dated 27th March 1786. In July following, the former tenant, the rector, and the lessor of the plaintiff, had come to an agreement, on issuing a writ of possession under an ejectment brought by the lessor and the rector, that the lessor of the plaintiff should have the possession. At Lady-day 1787, he received possession from that tenant; and in August 1787 paid the rent up to Lady-day 1788. On 17th March 1788, the defendant entered without any colour of title. There were two demises in the declaration; one on 6th April 1787, the other 17th March 1788. On the trial, the defendant relied on Eliz. c. 20. s. 1. which enacts, that "no lease of any benefice, &c. or any part thereof, not being appropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure, without absence above fourscore days in one year; but that

Cowp. 129.
S. P.

"every such lease, immediately upon such absence, shall cease and be void." The rector, in the present case, was wholly resident in another place. A verdict was found for the defendant, with leave to move to set it aside.—THE COURT declared, they were sorry that such a possession as that of the defendant, should find a shield from an act of parliament, the policy of which, whatever it was at the time when it passed, might now at least be much doubted. According to the maxim, *expressum facit cessare tacitum*, the lessor's title under the lease, excluded the suggestion of a subsequent demise. Even that would be equally void; since the act of parliament would affect a parol demise, as much as one by deed. Therefore, though the defendant was a stranger, and a wrong-doer, the plaintiff could not recover.

Doug. 51.
Cowp. 483.

AND a lease void, against a remainder-man, cannot be set up, either by his acceptance of rent, or suffering the tenant to make improvements, after his interest vests in possession.

COPYHOLD estates, as to the right of entry, have a retrospective relation from the time of admittance to that of surrender; and that against all persons, except the lord: the surrenderee therefore may recover in ejectment against the surrenderor, on a demise laid between the times of surrender and admittance. Which points were determined in the case of *Wooliams v. Clapham*.—ASHHURST, J. delivered the opinion of the court. "The demise was laid in April 1786. The plaintiff proved his admittance on the 26th July 1786, on a surrender by the defendant, by way of mortgage, made before April 1786; so that the demise laid was before admittance. The judge, on the trial, being of opinion, that the title of a copyholder was not complete, so as to maintain an ejectment, before admittance,

nee, nonsuited the plaintiff. On a motion to set aside the nonsuit, it was argued for the defendant, that a surrenderee cannot maintain trespass till admittance; for which was cited *Cro. Eliz.* 349. But we think that the doctrine laid down in that case will not govern the present. For trespass is a possessory action, and the case there put is of a surrenderee, *who never was in possession*; so the determination in that case may be true. But ejectment is a fictitious action for the trial of title. As against all persons, but the lord, the title of the surrenderee, after admittance, is perfect, *as from the time of the surrender*, and shall relate back to it. If there had been no admittance here, before the trial, it might have raised a greater doubt; though even then, in the present case, we do not think it would have barred the plaintiff's right to recover, for reasons which I shall state hereafter. But here there was an admittance before trial, and that shall, by relation, operate as to give the plaintiff a complete title from the time of the surrender; for the admittance is only a circumstance required by law, merely for the sake of the lord. In *Mumney v. Eves*, it was holden, that if customary land descended to the younger son by custom, and he enter and lease it to another, who takes the profits, and is afterwards ejected, he shall have an *ejectione firmæ*, without any admittance of his lessor, or presentment that he is heir; though there it might be as well urged, that the lessor's title was a part of *his*, and not complete without admittance. But if there could have been any doubt, as between the present lessor of the plaintiff and a stranger, we think that, considering the relation between the former and the present defendant, that doubt is removed; for this ejectment is brought *against the surrenderor himself by the surrenderee*: for the surrenderor is considered as a trustee for the surrenderee; 9. *Mod.* 75. The case of *Davy v. Wardham* is there cited; which was, where the testator

1. Leon. 100.

had agreed for the purchase of a copyhold, and, pursuant to that agreement, a surrender was made, out of court, to his use: then he devised all his lands, and died before admittance; it was decreed that the copyhold lands should pass; because the testator had a title, in equity, to recover them, and the vendor stood seised *for him* till a legal conveyance could be made. If then the surrenderor is only considered in the light of a trustee for the surrenderee, whatever might have been the case formerly, in these days the courts have considered this species of action with greater liberality, and will never suffer a trustee to set up a formal objection against the plaintiff's recovering possession of that property which he only holds in *his* right, and for *his* benefit. Therefore, on the whole, we think that this nonsuit ought to be set aside, and a new trial granted."

Cowp. 600.

AND as this is a fictitious action to recover the possession, if a man has made a solemn deed, covenanting that another shall enjoy the premises, and likewise for further assurance, he can never be permitted to dispute the title of the party to whom he has so undertaken; no more than a mortgagor can dispute the title of his mortgagee. And in construction of deeds, the rules laid down are founded in law, reason, and common sense: in short, they are to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, must operate in that which will legally effectuate the intention.

III. *Of what things it will lie; and how they are to be described.*

IT has been before observed, that originally in this action, only damages, not the possession, were recovered. But, as terms for years increased to a great length, and were, by such means, put out of the power of the freeholder; added to the advantage which they had over the freehold itself (in not being subject to the duties which were imposed upon it); it became absolutely necessary to concede the writ of *habere facias possessionem*, in order to recover the possession itself. When the possession therefore was to be recovered, it became necessary to confine it to such things as the sheriff might, with certainty, have recourse to, after judgment, to deliver possession of. This at least, was necessary formerly; but as the law, like every other science, has long been in a progressive state of improvement, the principle alluded to has for some time been *relaxed*. A learned judge (a) is reported to have said, that "he never could understand the manner of reasoning, so often urged, that the description must necessarily be *so certain*, that the sheriff might be exactly able to know, without any information from the plaintiff, of *what* to give possession: which was not true; for such precision was *not* necessary in an ejectment." Even in early times, and almost immediately after the formation of the action, the courts did not confine it to the rules in the Register, which govern the *præcipe*; but allowed it to be brought for some things which could not be demanded in a *præcipe quod reddat*:

Thus an ejectment was sustained for an orchard; *be. Cro. El. 854.*
 because it is a word of certain signification; though in a *Cro. Jac. 654.*
Noy 37.

(a) Mr. Justice Wilmot, 1. Burr. 630.

præcipe it must be demanded by the name of a garden; and being well enough understood, the sheriff might with certainty deliver it in execution.

Cro. El. 818.
1. Lev. 58.
Sty. 215.

So, and for the same reasons, for a stable and a cottage.

Cro. Jac. 654.
Palm. 337.

Of a house, is good; though in the *præcipe* it ought to be demanded by the name of a messuage. The ejectment is an action of trespass in its nature, and trespass has uniformly been maintained, for breaking or entering a *house*. Besides, the import of the word *domus* is well understood in the law; for instance, in an action of *waste*, wherein it may be recovered, besides damages.

3. Leon. 210.

So, of a chamber in the second story of a house, has been held good; there being certainty enough to direct the sheriff in the execution. In that case it was said, an ejectment *de unâ roomâ*, had been adjudged good. It has even been held that an ejectment for part of a house in *A.* is well enough.

Str. 695.
and see Cro.
Eliz. 286.

Noy 169

BUT an ejectment for a *kitchen* has been determined to be bad; for though the word be well understood in common-parlance, yet because any chamber in a house may be applied to that use, the sheriff hath not certainty enough to direct him in the execution; and the kitchen may be changed between judgment and execution.

11. Co. 55.
1. Roll. Rep.
55.
1. Salk. 254.

So it lies not of a *close*, because that is of uncertain extent; nor will it aid the declaration, it is said, though the close be called by a particular name; because that also leaves the extent of it so uncertain, that the sheriff cannot tell what quantity of land to deliver in execution.

Owen 13.

For the same reason, it lies not of a *PIECE of land*.

FOR

Styles 364.

Cro. El. 186.

Cro. Jac. 125.

Barnes 40.

edit. 173.

Stra. 834.

3. Mod. 238.

FOR a messuage or tenement is too uncertain; the word *tenement* being of a more extensive signification than the word *messuage*; consequently, it is uncertain what is demanded by the ejectment. For the same reason it has been held that it will not lie for a tenement only.

3. Willf. 23.

IN the last case of this kind (*Welch and Flood*), the court, with great reluctance, arrested the judgment. The plaintiff declared of one messuage or tenement. Verdict for the plaintiff. Motion in arrest of judgment, because an ejectment will not lie of a *tenement*; and messuage or tenement is so uncertain, that the sheriff cannot tell of *what* he is to give possession; for a tenement may be of an *advowson*, *house*, or *land* of any kind.—WILMOT, Ch. J. There was a late case in B. R. in which the declaration was of a *messuage AND tenement*, and that court gave leave to strike out the words "*and tenement*," and to proceed for the messuage. I think a messuage or tenement, in common parlance, means a messuage; and at this time of day, no mortal imagines that a *tenement* means anything but a *dwelling-house*; for by long use it has acquired that definite signification. *Hæstante curiâ*, a rule was granted to shew cause. The court seemed inclined to get over the objection if possible, and took time to consider; but at length, thinking themselves bound by the cases cited, arrested the judgment. With every deference to that decision, the reason on which the objection was founded, ought not, at present, to prevail; inasmuch as the sheriff *now* delivers possession of the premises recovered, according to the direction of the plaintiff himself.

Comp. 350.

3 Term Rep.
11.

AFTER verdict, an ejectment for a messuage AND tenement, has been held good.

So,

So, for a messuage or tenement, CALLED THE BLACK
 WAN, is good; for the addition reduces it to the cer-
 tainty of a dwelling-house.

1. Sid. 295.
 1. Ld. Raym.
 191.

So, for a messuage OR burgage in H. is good; because
 both signify the same thing, in a borough.

Hard. 173.
 Poph. 203.

So, for a messuage or dwelling-house; for messuage and
 dwelling-house are synonymous terms.

AN ejectment did not lie, while the proceedings were
 in Latin, *de repositorio*; because *that* signifies a voider or
 cupboard, as well as a warehouse; it was therefore un-
 certain what was demanded: but if "*Anglicè* a ware-
 house," had been added, that would have confined it to
 that particular thing.

Cro. Car. 555.
 1. Jones 434.
 S. C.

THE cases before referred to are mostly of an ancient date,
 and were decided upon the principle that the action must
 be confined to such things as the sheriff, after judgment,
 might with certainty have recourse to, and fully deliver
 possession of: it being originally the design of the law, in
 this action, to have the thing demanded so particularly
 specified, that the sheriff might with certainty know, *what*
 to give possession of, if the plaintiff should recover; for
 the judgment (being in order to execution) would be na-
 gatory, if execution could not be had of the thing speci-
 cally demanded. AT THIS DAY, however, the practice
 is otherwise. The sheriff *now* delivers possession, accor-
 ding to the direction of the plaintiff, who therein acts at
 his peril. The plaintiff himself must *now* *show* the
 sheriff that which under the writ he is to deliver possession
 of; and is to take possession, at his peril, *only* of what he
 has title to; for if he takes more than he has recovered,

1. Ld. Raym.
 1470.

1. Burr. 629.
 3. Burr. 2673.

and

and proved title to, the court will, in a summary way, set it right.

THE courts have long discontinued the rules which govern the *præcipe*; and allow many things to be recovered in this action, which cannot be demanded in that writ. Indeed it has repeatedly been determined that such precise certainty is not requisite in ejectment, as in a *præcipe quod reddat*; in which it is necessary to describe the lands demanded once, at least, with certainty and precision, that the defendant may know what he is to defend. Even in that proceeding, whenever the term used, either in respect to quantity or quality, was sufficiently certain and notorious to answer that purpose, it was good, though not particularly named in the Register. Of late years many things have been improved by art, which, having acquired new appellations, are now not only perfectly understood by the law, but familiar to common understanding, though not to be found in the ancient law-books. Words and names are arbitrary: and as men contracted by such new appellations, it was but reasonable to permit the remedy to follow the nature of the contract. Indeed, whilst ejectments were compared to real actions, and arguments were drawn by analogy from them, they were, of course, fettered: and this was very much the case, till after the reign of James the first. But of later times, an ejectment has been considered with more latitude and greater liberality; as a fictitious action to try titles with more ease and dispatch, and with less expence to the parties. Even formerly an ejectment would lie for an hop-yard. So for *alder carr*; a provincial term well known in *Norfolk*, where it signifies land covered with alders. In *Yorkshire* it is common to bring ejectments for cattle-gates; agreeable to which, it hath been held that an ejectment will lie for a beast-gate; a term

1. Rol. Rep.
165.

1. Burr. 629.

Palm. 337.

Str. 1063.

term used in *Suffolk* to denote land and common for the beast. A *cattle-gate* is a distinct thing from a right of common; it passes by lease and release; cannot be devised, but according to the statute of Frauds; and has been decided to be a tenement, within 13. & 14. Car. 2. 1. Term Rep. 12. for the purpose of gaining a settlement. 137.

ANCIENTLY, the judges would not extend this action Dyer 24. b. so far as they went in the assize; because there the recognitors, having a view of the thing demanded, had a more certain knowledge of it than can be given in ejectment; and therefore it was held that an ejectment would not lie *de crofto*, though an assize would. This is but a *Styl.* 30. but of no reason for the decision; and would not at present see *Style* 194. fail; for according to positive law and modern practice, See 4. & 5. a view might (on motion in the usual manner) be had of Ann. c. 16. f. 3. of the *locus in quo*, in ejectment, as well as in the ancient 3. Geo. 2. c. 25. f. 14. assize, or any other action. But where an ejectment was 1. Burr. 253. brought for a croft and an acre of meadow, the plaintiff had a verdict, and a special judgment for *his acre* of meadow, releasing the cost and damages for all; for he was allowed his costs, because by the judgment he had a just cause of suit against the defendant. It might, however, for a croft called *Blackacre*. 1. Lev. 58.

For twenty acres *jampnorum et bruerarum*, was held to 1. Mod. 90. well enough; because both were lands of the same Cro. Car. 179. nature, viz. heath, on which gorse and furze grow; the words, therefore, are understood to have the same certain signification in law.

So in modern times it hath been held that it will lie 3. Burr. 267a. for fifty acres of furze and heath, and fifty acres of moor and marsh. Yet heretofore an ejectment for one hundred Hardr. 57. Palm. 100. acres of waste, or *pro centum acris montis*, was held to be 1. Rol. Rep. bad 106. 189.

bad for the uncertainty; because both waste and mountain comprehend several sorts of land.

Cro.Car. 512. BUT it lies for one hundred acres of bog, in Ireland, where that word hath but one signification, and comprehends only one sort of land. And it has been since determined that an ejectment will lie for *mountain*, in Ireland, because there, the word mountain is rather a description of quality, than the situation of the land.

2. Burr. 623. So, for "a quarter of land," in Ireland; for it may be term as well known *there* as mountain is: and that the courts here will intend.

2. Keb. 745. So, "20 villis et terris," in Ireland.
1. Burr. 627.

1. Burr. 623. AND in the case of *Cottingham v. King*, the following description was held to be sufficient, on a writ of error after judgment in the common pleas, affirmed by the king's bench, in Ireland, viz. "five thousand messuages, " five thousand cottages, ten thousand acres of land, " in all those the lordships, manors, and late dissolved " abbey or monastery of Boyle and Infemacranaw; and " quarter of land of Tallagh, with the town and tenement " of Boyle, and fairs and markets thereunto belonging " in the county of Roascommon; and all those the lands " and hereditaments called Grangemore, and part of " Sumternat, &c. a large deer-park, &c.; and the parsonage of Longford, &c. in the county of Roascommon; and a small park or field, in the possession of, &c."

THE last case was after verdict on a writ of error the exception was to the *uncertain* description of the premises specified in the declaration; and most of the cases

In the subject were cited. Indeed *after* verdict, an eject- *Stra. 54.*
ment may be presumed to have been brought for such
things *only* for which it will lie; and of course that the
description is sufficient.

An ejectment *pro quatuor molendinis*, is good, without *1. Mod. 90.*
saying wind-mills, or water-mills; both being compre-
hended under that name in the Register.

So *de decem acris pſarum*; for the court held ten acres *1. Brownl.*
of pease, and ten acres sowed with pease, to be all one, *150.*
and therefore certain enough.

An ejectment for a manor is said to be ill, without *Latch 61.*
describing the quantity and species of the land contained *Lit. Rep. 301.*
therein. If the several sorts of land and messuages be not *Hetl. 148.*
set forth, and the jury find the defendant guilty *quoad*
messuagium et curtillagium, et non culp. quoad residuum; it is
doubted whether this be a good verdict, on which judg-
ment may be given. I cannot see any sound objection
against it.

An ejectment was brought *de castro villa et terris*, with- *Yelv. 118.*
out expressing the number of acres; it was held insuf-
ficient even after verdict, on a writ of error; because too
generally demanded, and therefore impossible for the
sheriff to know what quantity of land he was to deliver
upon the *habere facias possessionem*. For the reasons which
have been before offered, the objection would not now
avail.

An ejectment was brought for ten acres of wood and *1. Rol. Rep.*
ten acres of underwood. It was insisted (in error,) *432.*
that this was *bis petitum*; the objection was disal-
lowed, because they plainly are of different natures.

K

Those

Those who argued for the error seemed to admit it; for they insisted that no ejectment lay for underwood, which shews it must be of a different nature from wood: but that objection was also disallowed, because the nature of underwood is so well understood in the law, that the sheriff has certainty enough to direct him in the execution.

11 Mar. 1735.
1 Burr. 626.
630.

In the case of *Saville v. Borlace* determined in the house of lords, on a judgment in the exchequer, it was decided, that *his petitum* was no objection in ejectment.

1 Burr. 143.
Chester v. Alker.

An ejectment will lie for part of an HIGHWAY; for though the public have a right to pass over it, yet the freehold and all the profits belong to the owner of the soil; and the sheriff may give possession, subject to the public *servitude* or *easement* attached to it. But it must be described as *land*; and though it be built on, such a description will be sufficient.

Cro. Jac. 150.
Noy 121.
Doug. 304.
3vo.

So an ejectment lies for a coal-mine, because it is not to be considered as a bare profit *apprender*, a coal-mine comprehending the ground or soil itself, which may be delivered in execution. And though a man may have a right to the mine, without any title to the soil, yet the mine itself, being fixed in a certain place, the sheriff has a thing certain before him to deliver possession of.

4 Mod. 143.
1 Show. 364.
Salk. 255.
Carth. 277.
Comb. 201.
1 Burr. 627.

An ejectment was brought *de mineri carbonum* in Gateside. The action was brought in the county palatine of Durham, and the plaintiff had judgment: on a writ of error the judgment was affirmed, though it was not said in the declaration, how many coal-mines there were. The reason seems to be, because the word being in the plural

ral number, comprehended all the mines in Gateside! because the course was so in Durham, of which the court took notice.

AND for a rent or common *apprender*, as common in Co. Lit. 9. a. is, &c. or other things which lie merely *in grant*, an *ejectment* does not lie; because those, being incorporeal things, are in their nature invisible, *quæ neque tangi nec feri possunt*; and therefore not in their nature capable of being delivered in execution. But for common *appendant* Str. 54. *appertenant* an *ejectment* will lie; because the sheriff may give the possession of such common, by giving possession of the land to which it belongs.

So an *ejectment de piscaria*, in such a river, has been held ill. But in the case of the *King v. Old Alresford*, 1. T. Rep. 361. Cro. Car. 493. Cro. Jac. 146. Cro. Car. 492. 2. Mod. 277. Yelv. 143. 1. Brownl. 142. JUSTICE ASHHURST is stated to have said—"there is no doubt but that a *fishery* is a tenement. *Trespass* will lie for an injury to it; and it may be recovered in *ejectment*." An *assize* will certainly lie for a *piscary*, because it is (in the language of the law) *prosecutum in loco capiendum*. An *ejectment*, however, will not lie *quodam rivulo, sive aquæ cursu*, called *D.*; because it is impossible to give execution of a thing which is transient, always running.

But it has been sustained for a boilary of salt, that is, Cro. Jac. 150. 1. Lev. 124. Sid. 161. it should seem, where there is a well of salt water, and a man hath no inheritance in the soil, but only a grant of many buckets of the water as will arise, which are called boilaries: now, if any one withhold the buckets of water from the grantee, he may maintain an action of *ejectment* for the injury. This differs from the last case; because in *that*, the thing demanded was transient and always running; here the water is fixed in a certain place within

within the bounds and compass of the well, and considered as part of the soil; and therefore Sir Edward Coke says, that by the grant of a boilary of salt, the soil itself passes.

Co. Lit. 4. b.
Register, 227.

Ibid.

Yelv. 143.

1. Brownl.

142.

HENCE an ejectment lies *pro stagno*; because, in law, the word *stagnum* comprehends both land and water. So, for the same reason, an ejectment *de gurgite* is good. In the case of a river, if the ground over which the water runs, belong to the plaintiff, he ought to lay his action for so many acres of land, *aquâ cooperi*; but when the water only belongs to him, and the soil to another, the remedy is by an action on the case, for diverting the water-course.

Cro. Car. 362.

It lies *pro prima tonsurâ*; that is, if a man has a grant of the first grass which grows on the land every year, he may recover it, in ejectment, of him who withholds it from him; for the first grass, *prima tonsura*, is the best profit and grant of the property, therefore he who hath it is esteemed the proprietor of the land itself, till the contrary be proved; for the after grass or seeding is of the nature of *commonage*. As therefore, he who has the first grass, *prima tonsura*, hath the most signal profit of the land, and may keep it longer or shorter on the land, according to the season of the year, it is but reasonable to give him this remedy against the person who may oust him of it: especially since it is a fixed determinate thing which the sheriff may put him in possession of, and which distinguishes it from a right of common, or other profit *apprender*. The commoner cannot assign any one acre which he hath a right to separate from the rest of the commoners; whereas the grantee of the first grass has in reality a right to the land itself, till the crop be taken off, for no man can enter on the land till that be off, without being a trespasser.

For the same reason an ejectment lies *pro herbage*; Hardr. 330. herbage being the most signal profit of the soil, and the grantee having at all times a right to enter and take in.

So, perhaps, for the hay grass and after-math of a meadow, which is all the produce of the soil. 1.T.Rep. 451.

BUT not *de pannagio*; that being only the masts which fall from the trees, which the swine feed on, not part of the soil itself, as herbage is. 1. Lev. 213; 1. Sid. 416.

NOR is it settled, whether the *herbage* and *pannage* of a forest, are rateable under 43. El. c. 2. though in the case of *Lord But v. Grindall*, LORD MANSFIELD said, that the plaintiff, as Ranger of Richmond Park, was not rateable in respect of the herbage and pannage. In that case however, it was not the question before the court for decision, Dougl. 302. 8vo. 1.T.Rep. 338.

YET an ejectment lies *pro pasturâ centum ovium*, that is, for so much land as will feed one hundred sheep. Del. 95. and see 3.T.Rep. 772. 4 T. Rep. 671. 5. T. Rep. 329. *Butt v. Moore*,

TITHES are esteemed part of the incorporeal inheritance, and by the common law were considered of ecclesiastical consuance; but they are part of the profits of the land, and the profits of the land are, as it were, the land itself; in addition to which, they are both tangible and visible, so that they might be put in view in an assize; and have, in short, every property of an inheritance in land, except that (in the technical language of the law) they lie in grant, and not in livery. Divest the mind of the idea of matter, and there seems not to be any difference between an inheritance in lands and an inheritance in tithes. In the course of time, they came into the hands

hands of lay-proprietors; many persons became seised of them in fee, as of their lay inheritance; and, at length, they were realized by the legislature, and considered, in the hands of lay-proprietors, as a temporal estate. The 32. Hen. 8. c. 7. s. 7. enacts, "that in all cases where any person shall have any estate of inheritance, freehold, term, right or interest of, in, or to, any tithes, or other ecclesiastical or spiritual profit, made temporal, or admitted to be in temporal hands, or to lay uses, shall be thereof disseised, deforced, wronged, or otherwise kept from the same, shall have remedy in the temporal courts, for recovery thereof, as the case shall require, in like manner as for lands." Hence came the ejectment for tithes. It is however given only to lay impropiators. The act leaves spiritual persons to pursue the old remedy in the spiritual court; the words only extending to such spiritual profits as are made temporal, or admitted to abide

Cro. Car. 301. in temporal hands, or for lay uses. This doctrine hath
 Ld. Raym. 789. since been extended, by analogy, to tithes in the hands of
 1. Burr. 145. the clergy.

THE ejectment for tithes lies only against the person claiming or pretending to have title thereto; and not against such persons as refuse or deny to set them out by which is meant *subtrahors* of tithes. In such case the lay-person is, by the express words of the act, left to his remedy in the spiritual court.

See 27. Hen. 8. c. 21.
 32. H. 8. c. 7.
 2. & 3. Ed. 6. c. 13.
 11. Co. 25. b.
 1. Roll. Rep. 68.
 Dyer 84, 5.

BUT the plaintiff must be as particular in his demand of the tithe, as he would be of land; therefore an ejectment *de omnibus et omnimodis decimis in decem acris in D* without saying *granorum et sœni*, was held to be ill; in the same manner as it would be for one hundred acres of land, without expressing the several natures and qualities of the land. But the plaintiff is not obliged to set forth

the quantity of every sort of tithe, as he is of every sort of land; because tithe is in its nature uncertain, the quantity depending intirely on the fruitfulness of the land and season; an ejectment, therefore, *de quâdam portione granorum et fœni*, was held good, it being impossible to say how much the quantity would be. But though an ejectment lies of tithes in kind, yet it does not lie where the tithing consists, *in modo decimandi*, or the payment of an annual sum, in satisfaction of them. Ibid. 116. b.

THE plaintiff declared on a lease for tithes, belonging to the rectory of *D.* in *R.* and that the defendant entered upon him, and took such tithes, severed from the nine parts in *R.*; without saying, that they belonged to the rectory of *D.* which was held to be erroneous; because he did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in *R.* which did not belong to the rectory of *D.* T. Jones 328.

BUT in an ejectment for tithes, the plaintiff is not obliged to lay it for the rectory, or chapel, as well as for the tithes belonging to it: because the plaintiff may be ousted of the tithe, and not of the whole rectory, or chapel; and no one is obliged to sue for more than is withheld from him. Cro. Car. 308.
T. Jones, 321.

ACCORDING to *Rolle*, there is one circumstance peculiar to an ejectment for tithe; namely, the *time* of laying the entry, and ejectment. *Rolle* says, that where the declaration set forth the ejectment to have been in *May*, it was ill, because there could be no tithes, to be ousted of, at that season of the year. This cannot be correct; because the law does not take notice when tithes arise. 1. Rol. Rep. 68.

Latch 6s.

At common law, an ejectment lay for a rectory, which consists of a church, glebe lands, and tithes, and which therefore has been said to resemble a manor; the church being compared to the mansion-house, the glebe lands to the demesnes, and the tithes to the services. But evidence of tithes only, is not evidence of a rectory; and therefore it has been held, that where the plaintiff could only prove that the defendant took the tithes belonging to the rectory, there was no evidence of the ejectment, or ouster of the rectory.

17. Co. 25. b.
Sty. 101.
Doct. pl. 297.
Salk. 256.

It was formerly held, that an ejectment would not lie for a chapel, because it was *res sacra*, which was not devisable; but now, since chapels are become lay-inheritances, they are recoverable in ejectment, as other lay-estates. It should however, in point of form, be demanded by the name of a messuage. And if the service of the declaration be made on the chapelwardens, or on the person intrusted with the keys of the chapel, it will be sufficient. In the case of *the king v. the bishop of London*, it was said (*in argument*), that an ejectment would lie for a prebend's stall, after collation or admittance; for then it becomes a freehold.

4. Wils. 14.

IV. Of the ancient writ or process.

F. N. B. 220.
G.

FORMERLY every ejectment was commenced with a *pone*, as in trespass; the ejectment being a species of trespass; for ousting any person of his term, comes properly under that denomination: the original therefore was a *pone* in the following form.

REX

REX vic' salutem. Si A. B. feceris te securum de clamore
suo prosequendo, tunc pono per vadios et saluos plegios C. D.
nuper de L. gen. ita quod sit coram just' nostris apud Westm'
(tali die) ostensurus quare vi et armis manerium de B. quod
grasas' T. dimisit A. ad terminum qui nondum præterit intravit
et ipsum à firmâ suâ prædictâ eiecit et alia enormia ei intulit ad
grave damnum, &c.

The old writ ran thus:

Manerium, &c. intravit; et bona et catalla ejusdem A. ad Ibid.
volentiam IQs. in eodem manerio inventa cepit et asportavit; Plowd. 229,
ipsumq' à firmâ, &c. The form of the writ seems to have Reg. Brev.
been taken from the assise; which says, *Facias tenementum* 196.
illud resecisiri de catallis quæ in ipso capta fuerint, et ipsum te-
nementum cum catallis esse in pace usq' ad prim' assisam, &c.
The reason why the writs upon such disseisins were ex-
tended to goods and chattels, as well as to lands, was,
because antiently such disseisins were generally accompa-
nied with violence; the disseisors not only forcibly taking
possession of the land, but also the stock which was upon
it. For redressing those forcible intrusions of one lord
upon another, the assise was invented, and upon the model
of that the ejectment was framed.

UPON the old writ, the Register remarks, that it cannot Regist. 227,
be *de bonis et catallis asportatis*; because, in an action for
such goods, a man shall have an *exigent*, but in a writ of
ejectment *distress infinite*. BROWN, J. observed, that this Plowd. 228,
rule was ill taken; because process of outlawry lies in
ejectment, as well as distress infinite. And so is Fitz F. N. B. 220,
Herbert. In truth, it seems that the writ would have been K.
good, either with or without those words; for a plaintiff
must accommodate his writ to the nature of his case; and
the precedents are both ways, according as the ouster was
attended

Plowd. 229. attended either with the taking away of chattels, or not. The assise indeed has always the clause *de catallis*, because damages were recovered in assise for the mesne profits, which was one of the points complained of in that writ, and the old form has invariably been observed in that action. But an ejectment is not a proper action for the mesne profits, though it may comprehend the chattels which were taken in the ouster; because it was never laid with a *continuando*, as in an action of trespass for recovery of mesne profits, and could not therefore comprehend the mesne profits, which were taken during the whole ouster, since every act is a new trespass. The assise indeed punishes the whole disseisin, by giving commensurate damages, from the first act till the time of the action brought, as one intire disseisin,

THE writ itself, like all other antient writs in trespass, is an attachment, and in the same terms; *pone per vadium et salvos plegios*, &c. whereas, in other personal actions, they began with the writ, in nature of a summons, commanding the party to restore the thing in demand, before they proceeded to an attachment. The reason of the difference was, because in all cases of trespass, the party complains of a breach of the peace, whereon a fine was formerly due to the king, therefore no warning was given to the party, lest he should withdraw himself: but in debt, as the plaintiff had originally trusted the defendant, it was but reasonable that he should give him further credit, till summoned to appear. Besides, in trespass there was a *capias* against the person, because of the king's fine; which *capias* was generally used as the second process, and therefore the first was against his goods; whereas, in other personal actions, the whole process at common law, was against the goods only.

UPON this attachment, the sheriff returned pledges *de prosequendo*, on behalf of the plaintiff; and pledges for appearance on behalf of the defendant. The latter were either proper persons, who undertook for his appearance, or else his goods were forfeited on non-appearance. Pledges for the plaintiff were taken under these words in the writ, *si A. fecerit te securum de clamore suo prosequendo*; and for the defendant by these, *pone B. per vad' et solv' pleg.* And so it was in an assise, in which the same words are in the writ.

THE second step in this action, was either by *capias* or F. N. B. 320, distress infinite. The distress was the process of the party, ^{H.} the *capias* that of the king. For in all personal actions, as before observed, the proceeding was by summons, attachment, and distress infinite; in all criminal prosecutions, and in all prosecutions for fines due to the king, by *capias*. But in trespass, where the king required his fine for the prosecution, the plaintiff resorted to the prerogative process, to oblige the party to appear.

If the party was *attached* by goods or pledges, and did not appear, the *distingas* issued against all his goods and lands, to compel him to appear, which was called the *grand distress*, or *distress infinite*. If the sheriff returned *nihil* upon the *pone*, then they proceeded to *capias* and *outlawry*; because it appeared by the return, that the defendant had nothing whereby he could be compelled to appear. But the defendant had a remedy, if the sheriff did not actually serve the attachment, because the trial of such service was by examination of the sheriff's officers, on the plea of not being attached by fifteen days; and therefore, there was no false return against the officer for such return: and the rather, because the party was little, if at all, prejudiced, since he was discharged from the arrest

Brit. cap. 26,
2. Inst. 254.

Co. Lit. 6. b.
9. Co. 31. b.
Booth 9.

Br. Attach-
ment, pl. 12,
17, 18.

2. Inst. 143,
744.

arrest on making a proper appearance. Hence the *capias* at length issued as the first process, without any *nihil* returned on the *pone*. So when the *capias* was given in account, by the statute of *Marlebridge*, to lords, when their bailiffs had nothing to answer,—they first returned *nihil* on the *summons*, and then the *capias* issued; but for the reason before given, the *capias* afterwards issued in account as the first process; and so in *debt*, which was assimilated to account, by that statute.

1. Sand. 317,
3. Sid. 423.

Hil. T. 1788.

In ejectment, it was said, that the defendant was *summoned*, instead of *attached*, to answer; and the declaration held ill, upon a demurrer. [A similar objection, and that by *demurrer*, to a declaration in *trespass*, was however over-ruled, on argument in the court of common pleas, in a cause of *Barnard v. Mofs.*] But after verdict and writ of error brought, (no original being found,) whereby it appeared, there had been a vicious proceeding by summons, it was aided by the statute of *Jeofails*, 18. Eliz. c. 14. which makes the proceedings good after verdict, though the original be wanting. And though, if there had been a vicious original upon the file, it had been error, yet, when there was no original upon the file, it was helped by that statute, and the court would intend there had been a good original which was lost, and that the clerk had misrecited it.

1. Keb. 278.
281.
Jones 439.
Pro. Jac. 414.

THE first words of the writ are, "*si A. fecerit se securum de clamore sup.*" These gave authority to the sheriff to take pledges of the plaintiff; for the sheriff had no power to attach the defendant by virtue of the writ, unless the plaintiff first found security to prosecute his suit; therefore the sheriff first returned pledges *de prosequendo* upon the writ, though they were only *John Doe* and *Richard Roe*, or else the court had no power to proceed. But

though

though the omission of pledges was error, yet since only the roll was returned upon a writ of error, such error could not be assigned till *diminution* alledged by the plaintiff in error; upon which a *certiorari* issued to certify the original, which was the foundation of the suit. If upon such *certiorari* an original was certified, without pledges to prosecute, it was error; for though the statute of Jeofails helps the want of an original after verdict, yet it does not cure an ill one. And where the court was moved before the certifying of such original, they gave the party leave to amend, by adding the pledges of prosecution; since they have long been mere matter of form, and the declaration is not delivered on the original writ, but by virtue of the rule. But it has been said, that judgment given in an inferior court, is erroneous for the want of pledges; because pledges *de prosequendo* were originally taken to answer the king's amerciaments *pro falso clamore* of the plaintiff, in case judgment should be given against him; and the king gives no power to proceed, unless security be taken to answer his amerciements.

Cro. Eliz. 722.
Yelv. 108.
1 Sid. 84.

THE next words in the writ are, "*pone per vadios et salvos plegias*," which have been already commented upon.

If the word "*offensus*" had been omitted in the writ, it would, it seems, have been error; because the defendant is attached to answer, but otherwise it does not appear for what purpose.

THE next words in the writ are, "*quare vi et armis*," and, if those were omitted, it was an error incurable; because there should appear such a trespass in the writ as would give the king a fine, which could not be, unless those words were inserted. The *capiatur fine* however, has been

1. Keb. 164.

been long taken away: it was remitted by 5. W. & M. c. 12. The plaintiff by that act is to pay six shillings and eight-pence in satisfaction of the fine, which is to be allowed him in costs.

Palm. 404.

If the bill or writ, while the proceedings were in *Latin*, had been *unum clausum terræ*, i. e. a close of land, instead of *unam acram terræ*, i. e. an acre of land, it had been bad; because the particular quantities and certainty of the land were not set forth; but if a paper book in the office had *unam acram*, the court would amend the bill or writ by the paper book; because then it would appear to be only a misprision of the clerk. So, if the writ had been *devist*, instead of *demist*, the court on motion would have amended it.

2. Vent. 173.
Hob. 249.

THE TESTE of the writ was always fifteen days before the return, which was antiently thought sufficient time for a defendant to come from any part of the kingdom, to answer the plaintiff's demands, in the courts above.

Cro. Car. 91.
271.
Sty. Rep. 332.

On a writ of error, the plaintiff in error alledged *diminution*, because the roll was sent without an original, upon which a *certiorari* issued for the original, and an original was returned, bearing date before the demise laid in the declaration. That *prima facie* was bad: because there was no cause of action in the plaintiff at the time when the suit was commenced. But on the *sci. fa. ad audiend. errores* against the defendant in error, the defendant came in and alledged for *diminution*, that THAT was not the original upon which he declared. The court granted a new *certiorari*, because the plaintiff in error had the bringing in of the first original which was certified, and therefore might form mistakes in it, in order to reverse the defendant's judgment. And if upon such

new

new *certiorari*, they certified an original, bearing even date with the demise and ouster, the court would intend that the action was founded upon the second original and not on the first, and the plaintiff in error will not be permitted to make any allegation to the contrary. But where the first original certified was before the demise and ouster, and the second original certified was after appearance and imparlance, there the court doubted whether either of the originals would be good; for the first was commenced before the plaintiff appeared to have a cause of action, and the second *after* the action commenced, and therefore not a sufficient foundation for the action.

A DECLARATION was of *Michaelmas Term*, and the 1. Vent. 174. demise laid on the 30th of *October*, which was after the Term began; and to help that a writ was purchased, bearing *teste* the second of *November*: though it bore *teste* within the Term, which was unusual, yet in order to cure the mistake which otherwise might be alledged in the declaration, after verdict, it was allowed to be good.

So where on a first original upon the *certiorari* of the Cro. Car. 37. plaintiff in error, the demise appeared to be for three years, and the declaration shewed the demise to be for five years; upon the plaintiff's coming in and obtaining a second *certiorari*, he was permitted to purchase a new original to be certified thereon, setting forth a demise for five years conformable to the declaration.

THE want of an original, after verdict, is helped by Hob. 130. 134. the statute of 18. Eliz. 3. and the want of a bill in the 264. 281. 304. king's bench is helped, in the same manner, by the equity of the same statute; for the bill in the king's bench is in the nature of an original.

WHERE

Hob. 249.

WHERE an action of ejectment and an action of assault and battery were joined in the same writ, after verdict it was moved in arrest of judgment, because the battery was joined with the ejectment, and the damages being entire, the plaintiff could not release the damages in the battery, to take judgment and execution in ejectment.

2. Brownl. 235.

But if by the verdict, the damages had been found severally, he might release the damages in battery, and take judgment in ejectment. The reason is, that where the damages are entire, it does not appear that the plaintiff recovered by any title in ejectment; and therefore it cannot be seen by the court, whether those two actions were not originally joined, that the plaintiff might have a recovery in one, to save his costs in the other. But where the damages are given severally, it appears that the plaintiff had a good title in both cases; and therefore if he release his damages in battery, which was mis-joined with the ejectment, there is no reason why he should not take his judgment in ejectment; for though the court must judge the joinder of the action to be bad, where it appears to be a contrivance to save costs, which is the mischief of joining different actions; yet where there appears to be good cause in both cases, the joinder of the action is cured by the release; for the plaintiff should have judgment according to his right.

V. *The ancient practice; and in what cases it is still to be adhered to.*

3. Burr. 2830.

Co. Lit. 240.

Dalison 81.

Cro. El. 15.

Cro. Car. 302.

3. Lev. 387.

1. Salk. 245.

3. Lev. 312.

THE old way of proceeding in ejectment was, by sealing a lease on the premises by the party in interest, who was to try the title: which indicates the necessity of possession, as well as the right of entry.

4 Mod. 48. Skin. 300. Holt 263.

This

THIS, at first, was ruled not to be maintenance, nor within the statute against buying of titles (since the lessor demises on the land, and so is in possession), if the lease was made to servants or friends, who could not be presumed either to maintain or countenance the action; but if sealed to one of ability to maintain the suit, that was held to be maintenance: and by the rules of B. R. and C. P. Mich. 1654. f. 1. it is ordered, that "for the prevention of maintenance and brocage, no attorney be a lessee in an ejectment."

32. H. 8. c. 9.

Styles P. R.

165.

Bro. Tit.

Maint. 7. 14.

17.

2. Rol. Abr.

115.

Lill. Pr. Reg.

498.

By

L

It is curious and not altogether useless, to see how the doctrine of maintenance has, at various periods, been received in *Westminster Hall*. At one time, not only he who laid out money to assist another in his cause, but he who, either by friendship or interest, saved him an expence which he otherwise would have incurred, was held guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. A doctrine so repugnant to good sense and justice, could not long exist. Exception, in all its variety, soon interposed itself; till it was at length held, that if a person had any *interest* in the thing litigated, though on contingency only, he might lawfully maintain an action on it. To return,

If a man seal a lease upon the premises, he need not give notice to the PARTY IN INTEREST, at the time of entry, or sealing such lease; for it is sufficient to give notice to the tenant in POSSESSION afterwards, where it is done; that being sufficient notice for the party to make his defence; and it is not necessary that the plaintiff should give notice of his preparation, but of his trial.

This

Sey. Rep. 468. BY the ancient method, the person who had title of entry, used to enter upon the several parcels of land, and deliver declarations in the name of his own casual ejector, who did actually enter on the premises to eject; but the court required notice to the tenant in possession, that he might not be turned out without an opportunity of making his defence; and then such tenant in possession used to move the court, that as the title of the land belonged to him, he might defend in the casual ejector's name (which the court, upon an affidavit of that matter, used to grant), and that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless. Then the casual ejector was not permitted to release errors in prejudice of the tenant in possession, since the suit was carried on in his name by rule of court; though the process for costs was taken out against the casual ejector, and he was obliged to resort to the tenant in possession, who had undertaken to save him harmless.

Co. Lit. 252.
Palm. 402.

IN the old way of proceeding in ejectment, if several parcels of land were in the possession of several persons the practice was, to execute several leases, and deliver several declarations, upon those leases, to the tenants in possession. This was absolutely necessary when the freehold was in different persons. But where the whole was in the same person, there the difference was, whether it was in the same county, or not; for where different entries were necessary, different leases were equally so. Before 4 G. c. 28. where there was one disseisor of lands in one county though he demised them for years, or at will, to several persons, yet the disseisee might enter upon one of the lessees, in the name of all, and make a lease according to the old method, and comprehend them all therein: for the entry, to divest a freehold, must be made according

Co. Lit. 252. the freehold divides itself. And therefore, if the disseisor

made a lease for life to three several persons, the entry must have been several, and the leases several also. If *A.* had disseised *B.* of two acres in the same county, and *B.* had entered into one, without saying in the name of both, such entry would not divest the right; and therefore where there were several acres put in the same declaration, and the entry was made in the old way, it must have been in the name of all the acres named in such declaration; otherwise (the entry being not interpreted by words), the effect of entry could extend no farther than to the land into which the entry was actually made.

To understand this, we must consider, that entry was the same thing with the vindication, or *calumnia*, in the civil law, and was of equal notoriety with the feoffment; as the feoffment was anciently made upon the land *coram paribus*, who subscribed the feodal instrument in *testibus*; so it seems the entry was made upon the land, and afterwards the claim recorded in the lord's court, and hence called *clameum*, *vel calumniū apponere*, *vel advocare*. afterwards they allowed the feoffment to be good, when it was attested by strangers out of the land, and not made upon the land, and recorded *coram paribus*; though the manner of recording the claim of liberties, before justices in *eyre*, remained long after, as appears by the Register, which seems to be a continuance of the ancient practice. But when the feoffment was not attested by the parties in *chartis*, yet they were attested and tried by the *pares comitatūs*; and therefore if the land lay in two counties, the entry must have been made in each, because the attestation of both, if controverted, must have been tried by the *pares comitatūs*. As to the feoffment in general, and the operation of it, the reader may consult the case of *Atkyns v. 1. Burr. 60. to 127.* *Atkyns*, which is elaborately reported by Sir James Burrow; *Cowp. 700.*

and in which the whole law upon the subject seems to have been exhausted.

Yelv. 1.
2. Brownl.
248.
but see Cro.
Car. 165.
contra.

If husband and wife make a lease by indenture, and it make a letter of attorney to seal and deliver it as their deed, to the lessee upon the land; who, in order to try the title of the land, declares upon a lease made by husband and wife; it is bad: but if there be a necessity to try the title of the wife in the old method, the husband and wife must execute the lease *upon the land*, in their proper persons; because the wife, not being a proper person herself, cannot constitute an attorney. But this practice as to such instances, is now obsolete, since by the common rule, the demise is confessed, as supposed, to be made of the land.

I SHALL next take notice in what cases it is still proper to proceed after the old method.

Lil. Pr. Reg.
490.
5. Burr. 2830.

FIRST, where the houses or things for which the ejectment is brought, are empty: for in that case (of vacant possession), no declaration can be delivered, affidavit made of the delivery of it, consequently the court cannot proceed to give judgment against the casual ejector. The party therefore is forced to proceed in the old way, by sealing a lease on the land, and giving rule to plead: and when those rules are out, the court, upon affidavit of the whole matter, will grant judgment. Yet there can be no judgment against the casual ejector, without moving the court, though the rules for pleading are out; because the court will not grant any judgment against the casual ejector, who is only nominal, without a proper affidavit; otherwise, a third and an interested person might be tricked out of the possession.

Salk. 255. pl. 3.

BUT a very little matter is sufficient to retain possession; and therefore where the tenant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment was set aside.

So, if the tenant in possession keep the door shut, the best way is to seal a lease on the land, as was usual before the present rules were invented; but it seems that in that case, if the practice and fraud of the tenant appear to the court by affidavit, it will grant judgment against the casual ejector, *nisi, &c.* For, in such case, the fraud of the tenant supercedes the necessity of giving notice to him.

SECONDLY, when a corporation is lessor of the plaintiff, they should, it has been said, regularly execute a letter of attorney, authorizing some person to enter and seal a lease upon the land; for a corporation cannot make an attorney, or bailiff, but by deed; nor appear, but by making a proctor person their attorney, by deed. They cannot therefore enter and demise upon the land in person, as natural persons can; nor substitute an attorney, to enter into a rule for their costs; nor will an attachment go against them for disobedience to that rule. Hence, they heretofore made an actual lease upon the land, which was to try the title, and then the attorney proceeded in the common method, which, in the opinion of some, is not altered by the statute. Whatever was the principle or practice heretofore, it ought not *now* to operate. After verdict (and should it have any weight *before*?) it has been overruled; as in *Partridge v. Ball*. That was an ejectment in the lands in *Suffolk* on demise of the corporation of *Suffolk*. Upon not guilty pleaded, a verdict was found for the plaintiff. It was moved in arrest of judgment, in that it did not appear by the record that the lease

1. Ld. Raym.

136.

Carth. 390.

was by deed, or under the seal of the corporation. The prothonotaries certified, that the practice was (notwithstanding the common rule of confessing lease, entry, and ouster) in ejectment, for things *incorporeal*—as *tithes*, or upon demises of corporations—to lay the demise by deed. But it was adjudged in C. B. that it was aided by the verdict, and judgment was given there for the plaintiff. Upon which error was brought in B. R. and the judgment affirmed. HOLT, Chief Justice, said, “at this day the case of *Cro. Jac.* 613. is not law; *Swadling v. Pirrie* for now ejectments are grounded on fiction.”

Kent Summ.
Ass. 1794.

MR. JUSTICE ASHHURST ruled the same at King's Bench Lent assizes for the year 1781. And in *Farley*, on the demise of the *Mayor, &c. of Canterbury v. Wood*, the declaration stated the lease to have been made to the plaintiff under the common seal of the corporation. It was objected that the lease ought to be proved: but the objection was over-ruled by Lord Kenyon, who observed that by the common rule and appearance the lease was admitted as stated.

Dyer 86.

IF a corporation be aggregate of many, they may set forth the demise in the declaration, without mentioning the christian names of those who constitute the corporation; but if the corporation be sole, the name of baptism must be inserted; as if the demise be by a bishop, because where the corporation is aggregate, the name solely consists in its character; but where it is sole, it consists altogether in that person; therefore there cannot be a sufficient specification of that person, without mentioning his name.

THE *third* case in which the old method may be served, is, where the *several* interests of the lessor of

plaintiff be not known: then, it has been said, it may be proper to seal a lease upon the premises, lest the plaintiff should fail in establishing the several interest which each defendant possesses; and that therefore, in that case, it is the safest way to proceed in the old manner, even now. I do not, in the case put, see the necessity for proceeding after the ancient manner; inasmuch as by the common rule, according to the modern practice, the lease would, of course, be admitted; and though there be several defendants, yet each appears only and defends for such part of the premises as are in his possession.

FOURTHLY, where the proceedings are in an inferior court, the plaintiff must proceed by actually sealing a lease; because inferior courts are not competent to make rules to confess lease, &c.; and if they were, have no power to enforce obedience to them. Inferior courts, having but a limited authority, cannot make new rules to bind persons who do not come in by the proper process of the court; but the superior courts, having an unlimited authority, in every thing within their jurisdiction, may bind any person who consents to their rules. Hence, in the former, the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector, to save expence, 1. Keb. 690.
795.

BUT if an ejectment be commenced in an inferior court, and an *habeas corpus* be brought to remove it, and the plaintiff in the ejectment declares against the casual ejector, there may be a rule to confess lease, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

IF an *habeas corpus* be brought to remove a cause in ejectment out of an inferior court, the lands lying within 1. Keb. 119.
1. Sid. 313.

their jurisdiction, and the lessor of the plaintiff seal a lease on the premises, the courts above will grant a *procedendo*; because the title to the land is local, properly within the jurisdiction of the court below; where, if it proceed regularly, it will not be prohibited; but if the lessor has not sealed a lease on the premises, the courts above will not grant a *procedendo*.

2. Keb. 69.

If the lands lie partly within the cinque ports, and partly without, the defendant cannot plead *above*, the jurisdiction of the cinque ports; for though the land be *local*, yet the demise is *transitory*, and triable any-where; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he take proper measures for the purpose; yet if he will proceed in a superior court, as the demise is transitory, the defendant cannot stop his proceeding, because those courts have competent jurisdiction.

It seems, that if the defendant in an inferior court enter into a rule to confess lease, &c. and the cause be removed by *habeas corpus*, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court will grant an attachment against the judge for exceeding his authority and obstructing the course of the superior court. The defendant, it is said, is not bound by the rule of the inferior court, such rules being confined to the practice of superior jurisdictions. The *reason* does not correspond with that *liberality*, which has contributed so much to the advancement of the remedy.

VI. *The modern practice in ejectment; and herein, of the declaration.*

ONE of the most enlightened judges * that ever administered justice in this country declared, that he had it much at heart "to have the practice upon ejectments clearly settled, upon large and liberal grounds, for advancement of the remedy." That the noble judge alluded to had it much at heart, is manifest from his luminous decisions upon the subject. It is still, however, in a fluctuating state; and though the following detail of modern practice be, I trust, correct; yet, for my own part, I cannot avoid observing, that in the general practice of the law, the lasting advantages resulting from stability seem to be unknown; advantages, which must ever over-balance the slow improvement of gradual correction.

3. Burr. 1295.

THE ancient practice being almost exploded, it is now not usual to make out a *capias* against the possessor, upon an ejectment delivered; (as it was formerly, when men were actually ousted of terms for years;) nor is it necessary, except in the cases before alluded to, to make an actual entry, or to seal and deliver leases, on the premises: but the party who claims title, *feigns* a lease, and in the name of the feigned lessee, who should be some real person to answer for the defendant's costs, delivers a declaration of ejectment against the casual ejector, to the tenant in pos-

6. Mod. 389.

* LORD MANSFIELD;—"whose conspicuous and exalted talents conferred dignity on the profession; whose enlightened and regular administration of justice made its duties less difficult and laborious; and whose manners rendered them pleasant and respectable." *Reg. for 1788*, p. 241. He was thirty-two years chief justice of the king's bench.

session;

session; or, if there be several such tenants, to each of them. This declaration is in the nature of process to bring in the tenant; therefore a notice is subjoined, and delivered with it, which must be signed either by the casual ejector, or by the nominal plaintiff; informing the tenant, that unless he appear to defend his title by a limited time, judgment will be entered against the casual ejector, and he (the tenant) will in consequence be turned out of possession. This notice, and also the declaration to which it is subjoined, must be read or explained to the party served, at the time of service; and if the ejectment be brought for premises in London or Middlesex, the notice should require the tenant to appear on the first day, or within the first four days of the subsequent Term; but then the declaration must be delivered before the effoin day of that Term. In country causes, or where the premises are situate in any other city or county than London or Middlesex, the declaration ought to be delivered before the effoin day of the issuable Term after which the cause is designed to be tried; and the notice, in such case, should require the tenant to appear in that term, generally.

Cowp. 176,

As ejectment is a local action, the *venue* in the declaration must be laid in the county in which the premises are situate. The proceeding being *in rem*, the effect of the judgment cannot be had, if the *venue* be laid in a wrong place. Possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; the judgment therefore could not operate, if the action was not laid in the proper county.

Lil. Pr. Reg.
499.

BEFORE the statute 4. G. 2. c. 28. the declaration against the casual ejector, must have been served either on

the tenant himself or on his wife, and could not have been served on any of his children or servants. The reason was, that the tenant, by having explained to him the meaning of the declaration, had sufficient warning to defend his title; which the court did not think reasonable should come to him at second-hand; unless from his wife, who was presumed to be equally concerned in interest with himself. In that respect, it differed from a summons, which might either be delivered to the tenant, or upon the land; in the latter case, the sheriff came upon the land, and summoned the party to appear, by setting up a white wand; which was anciently a mark, that the land was claimed by others.

Now by that statute, in one instance, and under particular circumstances, namely, "in all cases between lord and tenant, when half a year's rent is in arrear, for which no sufficient distress can be found on the premises, and the landlord has right by law to re-enter for non-payment, he may, without any formal demand or re-entry, serve a declaration in ejectment for the premises in question; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, may affix the same upon the door of any demised messuage, or in case there be no messuage, upon some notorious place of the land: and such affixing shall be deemed a legal service."

THE service, in *general* cases, need not be on the premises, if the tenant himself, or his wife, be personally served; otherwise it must. And by the modern practice in ejectment, service on the child or servant of the tenant is deemed good service; provided it be made on the premises,

Str. 1064.

2. Blac. 800.

Barnes 175.

176. 180. 183.

188. 190. 191.

2. Wils. 163.

1. H. Blac. 644.

misses, and be afterwards acknowledged by the tenant, or his wife: and that, though it may not *clearly* appear that the declaration came to hand before the effoin day of the Term.

BUT if the tenant abscond, or keep out of the way, to avoid being served, it is usual to serve a declaration on some person residing at his house; or, if that cannot be done, to affix the same upon the door; and then, on an affidavit of the circumstances, to move the court for a rule upon the tenant, to shew cause, why such service should not be deemed sufficient: the court will prescribe the mode of serving the rule, which is generally made absolute on an affidavit of its service. As in *Collins v. Dunch*, an affidavit was made, that the tenant in possession absconded, and that the plaintiff had personally served his niece, who was the only manager of the house, and resided in it; and had also fixed up another copy of the declaration upon the premises. The court, perceiving the inconvenience that landlords might suffer by being kept out of possession, thought it reasonable to make a rule upon the tenant in possession to shew cause "why judgment should not be entered up against the casual ejector;" and accordingly did make such rule. And they further ordered, that notice of the present rule being given to any person in the house, should be sufficient; and if no person was in the house, then to be affixed to the door, &c. The rule was made absolute without opposition, on affidavit of notice being given to the niece, and also affixed to the door of the house.

So in *Tyrrell v. Denn*, a rule had been obtained on the tenant in possession, to shew cause why service of the eject.

ejectment, which had been made upon a woman who had said her name was *Magdalen Campbell* (the name of the tenant), at the time when it was served upon her at her house, should not be deemed good service upon *Magdalen Campbell* herself; and why the lessor of the plaintiff should not have leave to sign judgment against the casual ejector, in default of her appearance: in which rule it was further ordered, that leaving a copy of the rule at the house of *Magdalen Campbell*, with some person there; or if no one could be met with, affixing a true copy of it on the door thereof, should be deemed good service thereof on *Magdalen Campbell*. The rule was made absolute, upon producing an affidavit, "that *Magdalen Campbell* was either not at home, "or (if at home) was denied; and that her servant maid "was at home, but could not be served; whereupon a "copy of the rule was fixed on the door of the house;" and moreover, "that at a subsequent day, (upon a doubt whether what had been already done was sufficient), "the maid being at home and opening the window, "but refusing to open the door, and denying that "her mistress was at home, another copy was affixed on the door, and the maid was told the "effect of it; and another copy was thrown in at "the window; and the original rule was shewn to the "maid."

In *Methold v. Noright*, it was moved (on the authority of *Collins v. Dunch*), that service of a declaration in ejectment at the house of the tenant in possession, on 13th of 1. Blac. 190. May preceding, might be good service; it having formerly been usual to grant such rules, with respect only to future service, and not with any retrospect. But that, in the case relied upon, this rule was first altered in the king's bench, it having before been the course of the common pleas.

A rule

A rule to shew cause was granted, and that service of the rule at the house might be good service. This motion went off afterwards, on terms of compromise.

1. Blac. 317

So, in *Gulliver v. Wagstaff*, a rule was granted, and afterwards made absolute, that service of a declaration in ejectment, at the house of a tenant in possession, on a day *past*, might be good service; and that service of the first rule, at the house of the tenant, should be good service.

AND, under similar circumstances, such is now the known uniform practice of every court in *Westminster-Hall*.

Lil. Pr. Reg.
499.

AFTER the declaration is delivered, the person who delivered it must make an affidavit (except in the case of a vacant possession) that he delivered to the tenant, or his wife, &c. a true copy of the declaration, and read or explained to him the notice annexed thereto. If the declaration was served on the child or servant of the tenant, the affidavit must state further, "that the service was afterwards acknowledged by the tenant."

Barnard. K.B.
330. 429.

THE affidavit must be positive, viz. that *A. B.* was tenant in possession, or that he acknowledged himself to be so; because no one should be evicted from possession without a positive affidavit, on which, if it be *false*, the person who made it may be legally and effectually subjected to the penalties of perjury.

Lil. Pr. Reg.
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UPON this affidavit, the plaintiff moves for judgment against the casual ejector, which is always granted, unless the tenant, in due time, enters into the common rule, to confess lease, entry, and ouster.

THE

THE motion is of course, that is, such as only requires the signature of a counsel or serjeant, who delivers it over to the clerk of the rules in the king's bench, or to the secondary of the common pleas.

THE affidavit required, where the declaration is served *Caf. Pr. C. P.* in pursuance of the 4. G. 2. is, in substance, as follows: ^{68.}

"that the declaration was fixed upon such a place, being
 "the most notorious part of the premises in question
 "(there being no person in possession, on whom the de-
 "claration could be legally served); that half a year's
 "rent was then due from the tenant; that no sufficient
 "distress was to be found upon the premises, to answer
 "the arrears then due; that the late tenant held such
 "premises by virtue of a lease from the lessor of the
 "plaintiff; and that therein is contained a clause of re-
 "entry for non-payment of that rent."

THE act 4. G. 2. gave rise to the case of *Hitchings* 1. Burr. 614. v. *Lewis*; and though that case depended on its own peculiar circumstances, yet the professed intention of that act was taken into consideration by the court, in giving its judgment. That was an ejectment brought by a tenant against his landlord, who had before obtained judgment by default, in an ejectment brought by him against the same tenant. The case stated, that *Thomas Lewis*, being seised in fee, demised to *John Hitchings*, to hold for ninety-nine years, if three persons should so long live, at 11l. 5s. payable at Michaelmas yearly, subject to a proviso, that if the rent should be in arrear for one month, being lawfully demanded, and no sufficient distress upon the premises, it should be lawful to re-enter, &c. That *John Hitchings*, the lessee, entered, and died; having first made

his will, whereby he devised the term to his son *Edward Hitchings*, lessor of the plaintiff, and made his wife executrix. The executrix duly proved the will, and assented to the legacy: the devisee, *Edward Hitchings*, the lessor of the plaintiff, entered into the premises, and became possessed of the term; and continued in possession till 15th of April 1737. That *Thomas Lewis*, the original lessor, by his will, devised to several trustees, &c. in trust for *Morgan Lewis*, an infant, &c. and died seised, &c. and the devisees in trust became seised, &c. And three years rent being in arrear from *Edward Hitchings* for the premises, a declaration in ejectment was served upon him, under 4. G. 2. c. 28. on the demise of the trustees and devisees; judgment obtained by default, against the casual ejector; a writ of possession issued thereupon; and possession delivered to the trustees on said 15th of April 1737. That the trustees had retained the possession; and *Edward Hitchings* (lessor of the plaintiff) had not since paid nor tendered the rent in arrear, or any part thereof, nor the costs; nor filed any bill for relief in equity.

ON trial of the second ejectment, brought by *Edward Hitchings* against *Lewis*, though no affidavit was produced, "that half a year's rent was due before the first declaration in ejectment was served upon *Edward Hitchings*, &c." yet a verdict was found for the plaintiff, subject to the opinion of the court, "whether or not the plaintiff ought to recover:" which depended on the following question, "whether it was necessary for the defendant, *Mr. Lewis*, to produce the affidavit alluded to;" and to prove that the lessors in the former ejectment "had power to re-enter."

LORD

LORD MANSFIELD. The general question depends upon the particular one, namely, "whether the first ejectment was regularly brought and proceeded upon, by the trustees under *Thomas Lewis's* will, pursuant to 4 G. 2. c. 28. s. 2." This last ejectment is brought near twenty years after the former. Now, besides the general presumption that the proceedings were regular, here is a decisive fact stated, namely, "that the proceeding under the first ejectment was under and by virtue of the act of parliament." Indeed *Edward Hitchings* was in possession, as appears by the case, till 5th of April 1737, when possession was delivered (by virtue of the writ of possession) to the trustees; so that being tenant in possession, he must have been served with the declaration in ejectment; whether it was a common law proceeding, or a proceeding under 24 G. 2. But the case states it to have been a proceeding under that act; if so, the judgment must have been founded upon such an affidavit as the act requires. And the case does not state, affirmatively, "that the judgment was irregular;" or, explicitly, "that there was no affidavit at all;" or indeed any thing to rebut the presumption, which is extremely strong the other way. For *Edward Hitchings* acquiesced under this judgment, execution, and possession, for almost twenty years; never tendered the rent and arrears, together with costs (pursuant to the act), nor filed any bill, for relief, in equity, within six months after the execution executed; nor indeed at any subsequent time. So that he is barred by the statute, foreclosed from all relief in law or equity (other than by writ of error), and the landlord is, by virtue of the act of parliament, to hold the premises discharged from the lease, on the supposition that his former proceedings were regular. The affidavit may be lost after this length of time; or the landlord may be unable to procure it; although there were, in fact, a

M

proper

3. Co. 77.

proper one made, to support his judgment and execution: and it would be too hard to put the labouring oar upon the landlord, of proving the regularity of all the circumstances upon which his judgment and execution were founded. As to the suggestion, "that there may be fraud, "connivance, or collusion, with the under-tenant, in "the manner of recovering judgment against the casual "ejector;" it is merely imaginary in the present case. Besides, fraud will infect every thing: and upon the principles of *Fermor's* case it would not stand. There can be no suspicion of any such thing here. For *Edward Hitchings*, the present lessor of the plaintiff, the person who has thus long acquiesced under the judgment and execution, and never attempted to be relieved from it, is himself the very man upon whom the declaration, in the first ejectment, was served. The professed intention of this act of parliament was, to take off from the landlord the inconvenience of his continuing always liable to the uncertainty of possession (from its remaining in the power of the tenant to offer a compensation at any time, in order to found an application for relief in equity), and to limit the tenant to six calendar months after execution executed, for the doing of it: else that the landlord should from thenceforth hold the demised premises discharged from the lease.

His Lordship was therefore clearly of opinion, "that "the plaintiff ought not to recover."

Denison, J. concurred, "that the plaintiff had no "title to recover." The former ejectment brought by the landlord against *Edward Hitchings* the tenant, who is now become lessor of the plaintiff in the present ejectment is stated to have been served upon *Hitchings*, "under and "by virtue of this act 4. G. 2. c. 28." Now the act ex-

pressly

precisely recites, "that great inconveniences frequently
 "happen to landlords, in cases of re-entry for non-
 "payment of rent, from the many niceties attending re-
 "entries at common law; and that expences and de-
 "lay often happened from injunctions out of equity;
 "after judgment in ejectment;" and the act is pro-
 fessedly made, to prevent these inconveniences. It pre-
 scribes a method of proceeding, in two cases or manners
 of recovering upon the proceeding in ejectment, which it
 directs: one, in case of judgment against the casual
 ejector; the other, in case of a trial. In the former (and
 so also upon nonsuit on not confessing lease, entry, and
 ouster), it directs, "that it shall be made appear to the
 "court where the suit is depending, by affidavit, that half
 "a year's rent was due before the declaration was served;
 "that no sufficient distress was to be made upon the pre-
 "mises, countervailing the arrears due; and that the
 "lessor had power to re-enter:" in the latter case, the
 same must be proved upon the trial. The present ques-
 tion is upon a judgment against the casual ejector, by de-
 fault; and upon an ejectment brought under this act.
 We must presume it to have been regular, as nothing
 appears to the contrary. And this case is not like that of
Jefferies v. Dyson: where, "in an action for *mesne* profits, 1. Str. 480.
 "the plaintiff offered a recovery in ejectment against the
 "casual ejector; upon which no writ of possession had
 "issued: when the defendant would have gone into the
 "title, the plaintiff insisted that he was estopped from
 "doing so, by the judgment against the casual ejector."
 But the Chief Justice held, "that though it would have
 "been an estoppel, if the then defendant had been made
 "a defendant in the ejectment, and the verdict against
 "him; yet that judgment, to which he was no party,
 "could be no estoppel to him;" and therefore the de-
 fendant was permitted to controvert the title. And that
 distinction is right; but not like the present case.

Foster, J. was of the same opinion. The judgment is certainly good, till set aside. The present objection, "of the not producing such an affidavit," is grounded upon the 4. G. 2. c. 28. and that act does require such an affidavit; and for that very reason we must presume, "that there was such a one made, and that the judgment was founded upon it." But the plaintiff in that ejectment has it not: it remains in the office.

WILMOT, J. also concurred. It would be unreasonable, that the plaintiff should recover from the landlord, after almost twenty years acquiescence, and after the landlord may have improved the estate. The act was made to compel lessors to bring their ejectment, or their bill in equity, within a limited time. And this is stated to be a proceeding "under and by virtue of that act." Therefore there must have been such an affidavit, though the present defendant did not produce it.—Judgment for the defendant.

BUT though the rent has become due, yet if it be afterwards tendered, and that before delivery of the declaration, the court will set aside the proceedings under the 2. Black. 746. act: as, in *Stevenson v. Noright*. It was moved to set aside proceedings with costs, in an ejectment under 4. G. 2. c. 28. for non-payment of rent, the lease having a condition of re-entry. The declaration was delivered 4th December 1770; but on the 7th of November preceding, the tenant in possession had tendered his rent, which was refused by the lessor of the plaintiff, because he had put the affair out of his own hands. On 23d November it was again tendered, before witness; and being again refused, the tenant left the money in his landlord's bakehouse, in his presence.

It was shewed for cause, that instructions had been given to an attorney to bring the action; that the tender should have been made before action brought, in order to stay proceedings; otherwise it was merely matter of defence upon the trial.

BUT by GOULD and BLACKSTONE, Justices, (absent DE GREY, Chief Justice, and NARES, Justice,) the tender was made before any notice of the action; and therefore the rule absolute.

IN the king's bench, if the premises are situate in London or Middlesex, and the notice requires the tenant to appear on the first day, or within the first four days, of the next Term, the plaintiff should regularly move for judgment against the casual ejector, in the beginning of that Term; and then the tenant must appear within four days inclusive after the motion, or the plaintiff will be intitled to judgment. If however, the motion be deferred till the latter end of the Term, the court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after Term; though if the motion be not made before the last four days of the Term, the tenant need not appear until two days before the essoin-day of the subsequent Term. And should the notice in such case require the tenant to appear in the next Term generally, the tenant has the whole of that Term to appear in.

IN the common pleas, if the premises are situate in London or Middlesex, and the tenant has notice to appear in the beginning of the Term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector, for default of appearance, unless such motion be made within one week next after the first day of every

Reg. Trin.
32. Car. 2. C.B.

Barnes, 4to
edit. 172.

Michaelmas and Easter Terms, and within *four days* next after the first day of every Hilary and Trinity Terms. But it has been holden, that this rule does not extend to the case of a vacant possession, under the statute 4. G. 2.

Salk. 257.

Mich. 31. G. 3.
4. T. Rep. 1.

In country causes, though the declaration be delivered before the esboin-day of Easter or Michaelmas Term, yet the tenant, in both courts, is allowed till four days after the next issuable (that is, Hilary or Trinity) Term to appear; and if the cause arise in Cumberland, or in any other county where the assizes are held but once a-year, the tenant is not compellable to appear till four days after the Term preceding the assizes. But in the king's bench, the plaintiff must move for judgment the same Term in which the tenant has notice to appear; though the practice is different in the common pleas, for there he may move for judgment at any time during the next issuable Term. By a late rule of the court of king's bench, the clerk of the rules is, for the future, to keep a book, in which is to be entered all the rules which shall be delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry is to specify the number of the entry; the county in which the premises lie; the name of the nominal plaintiff; the *first* lessor of the plaintiff (with the words "*and others*," if more than one); and also the name of the casual ejector. And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the Term in which the ejectment shall be moved, no rule is to be drawn up, or entered, nor any proceeding had in such ejectment.

Lil. Pr. Reg.
499.
Comb. 309.

It is next to be considered who may defend in ejectment. By the common law, no person is admitted to defend

defend, unless he be tenant, and is or hath been in possession, or receives the rent; because it is an act of champerty for any one to interpose, and cover the possession with his title; and if the party could make any person defendant with another, who was not concerned in the possession, it was a mischief at the common law; because, if the plaintiff recovered against one of the defendants, the stranger, who was acquitted, had no remedy for his costs. But this was remedied by the 8. & 9. W. 3. c. 11. §. 1. whereby costs are given to the person "*so acquitted*;" unless the judge certifies immediately on the trial, that the plaintiff had a probable cause for making him a defendant.

Now by 16. G. 2. c. 19. (which was made in aid of Sect. 11. landlords, where ejectments are brought inconsistent with their titles, and to prevent fraudulent recoveries of the possession, by collusion with the tenant) "such tenant" "being served with a declaration in ejectment, must" "give notice thereof to his landlord, under the penalty" "of three years improved rent." The penalty however does not attach on the tenant of a mortgagor who omits to give him notice of an ejectment brought by the mortgagee, in order to enforce an attornment; as was determined in *Buckley v. Buckley*. An action was brought 1. T. Rep. 647; against the defendant, upon the act, for secreting an ejectment. In 1785, the premises being in mortgage and the mortgage forfeited, the defendant (who was tenant to the plaintiff) had agreed, in a conversation he had with the attorney of the mortgagee, to attorn to him; but the attorney, not thinking the promise sufficient, delivered to the defendant an ejectment in April 1785; informing him at the same time, that it was only for the purpose of procuring a written attornment, and would not be prosecuted further. In consequence of which the de-

defendant actually attorned to the mortgagee. He gave no notice to the landlord, either of the ejectment or of the attornment; for omitting the former of which the action was brought. The learned judge, being of opinion that this case did not come within the statute, nonsuited the plaintiff; which nonsuit counsel moved to set aside. THE COURT however were of opinion, that this case did not come within the statute; for that it only extended to cases where ejectments were brought inconsistent with the landlord's title. They observed likewise, that the ejectment was brought for the purpose of compelling the tenant to attorn to the mortgagee, which the act expressly permitted him to do.

Sec. 11.

Sec. 13.

Salk. 257.

7. Mod. 70.

Burr. 1301.

By the same statute, "the landlord may, by leave of the court, make himself defendant with the tenant in possession, in case he appear;" [which is no more than he had a right to demand *before* the statute:] "and in case such tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector. But if the landlord shall desire to appear *by himself*, and consent to enter into the like rule as the tenant, in case he had appeared, ought to have done, the court shall permit him so to do, and order a stay of execution upon such judgment, till further orders."

Barnes, 4th edit. 193.

UPON this statute, it hath been said, that the court has *no jurisdiction* to admit any person, but the landlord, to defend, instead of the tenant; therefore where J. L. who claimed as devisee, brought an ejectment against the tenant in possession, and J. S. who also claimed as devisee, moved the court that he might be made defendant, instead of the tenant, who had refused to appear, the motion was denied.

BUT

BUT this doctrine was reprobated by LORD MANSFIELD in the case of *Fowler v. Sharnille*; in which the principle was considered, and the cases anterior to the act investigated and explained. In that case it was moved, on behalf of the plaintiff, to discharge a rule, whereby it had been ordered that Earl Gower and Thomas Giffard, landlords of the tenant in possession, should be joined and made defendants with the tenant, if he should appear; and if he should not, that they might appear for themselves.

THE objection to the rule was, "that Earl Gower and Mr. Giffard had never been in possession;" and that the act was made for the security of landlords who had been in possession only, and whose tenants neglected to give them notice of ejectments.

A CASE was cited where such a rule had been made "to shew cause," only; and on cause being shewn (viz. *Goore v. Roe*, 3 Burr. 1290, "that neither party had been in possession"), the rule was discharged. Here the Earl and Mr. Giffard claimed by escheat, on the death of *Elizabeth Levison*; and the plaintiffs claimed as heirs at law to her; but neither had been in possession.

ALL the tenants but one had attorned to the lessors of the plaintiff; and that one did not appear.

AND to prove "that the court have no jurisdiction to admit any person to defend an ejectment instead of the tenant, except one who is, in some degree, in possession," *Barnes* 420 *Leak and others v. Doe* was cited. 193.

ON shewing cause against the rule, it was admitted that the lessors of the plaintiff claimed as heirs, and Earl Gower and

and Mr. Giffard, by escheat of a copyhold, *pro defectu*
heredis; not for a forfeiture for want of an heir coming
 in: and therefore only desired to have the cause tried. A
 lord of a manor, it was said, has such a seisin in law of
 an escheated copyhold, that the occupier is his tenant at
 will, and the lord may distrain for the rent; and though,
 perhaps, the occupier may not be liable to the penalty of
 the triple, yet the lord may avow upon him for the single
 rent. The lords by escheat claim upon the same foot as
 if they were heirs to the deceased tenant; and the heir
 might be admitted to be made defendant, though he had
 never received rent. The estate originally belonged to
 the lords, moved from them, and reverts to them, for
 want of heirs of the tenant; and are neither strangers, nor
 collude with the tenant. That the statute should be
 extended further than to those cases only where rent has
 been actually received: to landlords *de jure*, as well as to
 landlords *de facto*. That a mere probable cause of claim
 was sufficient to intitle the landlord to be made defendant,
 his real title being to be tried afterwards. That before
 the statute, the landlord had a right by law to be joined
 with his tenant; and the statute only enforces this right,
 and should, therefore, be construed liberally, to prevent
 the mischief which occasioned the making of it. That
 the case of *Goore v. Roe* was a case where no rent had
 been paid by anybody, and the purchase of a pretended
 title: but the lord of a manor is *dominus terre*; and
 within the words of the act.

470. 193.

LORD MANSFIELD. — “ I do not understand the no-
 “ in *Barnes*. It puts the refusal of the motion upon
 “ want of jurisdiction. Whereas, in ejectment, the
 “ court can never want jurisdiction to prevent the
 “ plaintiff from recovering without a proper trial. A

ejectment is the creature of *Westminster-hall*, introduced within time of memory, and moulded gradually into a course of practice, by rules of the courts. The same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience points out either inconveniences or defects. The act of 11. G. 2. was drawn and brought in by Sir John Strange: the provisions therein, relative to proceedings in ejectment, were either to enforce a right practice, or occasioned by some case contrary to the general sense of the bar, which the legislature virtually condemned as erroneous. In *Strange* 1241, there is not a syllable about a mortgagee being refused to be admitted to defend as landlord.

The counsel for the plaintiff contended, that potential landlords are not within 11. G. 2. c. 19.; for "such" landlord must be a landlord to whom the tenant is obliged to deliver the declaration.

The act, they said, was made to defend an actual possession only; not to give one: for before the act, no man could have come and been admitted to defend with, or instead of the tenant; nor have put himself in possession. And the act only lets in the landlord to prevent the tenant from giving up the possession. That the solid construction of the act was, "that there being no possession, there could be no landlord." And the case of *Goore v. Roe* went upon that principle, and was fully discussed. In that case the rule was discharged. There no rent had ever been paid under the lease; and the court observed, that the tenant would not have been liable to the penalty for not delivering the declaration. That there was no privity between the lord by escheat and the tenant: and

and rent must have been actually received (except in cases of mortgagees after forfeiture, or such like). And even an heir, who had never received rent, could not be let in to be made defendant, under the act. Moreover, the plaintiff claimed as *heir*. And a lord claiming by escheat was intitled to no favour, where another claimed as *heir*.

LORD MANSFIELD.—It is a point of great consequence; and I am glad it will be settled. An ejectment is an ingenious fiction, for the trial of titles to the possession of land. In form, it is a trick between two, to dispossess a third by a sham suit and judgment. The artifice would be criminal, unless the court converted it into a fair trial with the proper party. The controul the court have over the judgment against the casual ejector, enables them to put any terms upon the plaintiff which are just. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the court was enabled to add conditions; and therefore obliged him to allow the fiction, and proceed to trial upon the real merits. It might happen, that the tenant in possession was a mere farmer at will. He was bound to give notice to his landlord. The same reason, of a fair trial with the proper party required the landlord to be admitted defendant; with the tenant, if he was amicable; or without him, if he, contrary to the duty of his relation, should betray the cause. There can be no ground for admitting the landlord to be a co-defendant, which does not hold to his defending alone, in case the other abandons. The plaintiff ought not to recover by collusion with one, to the prejudice of a third: he ought not to recover without a trial with the person interested in the question, and affected by the

judge

judgment. There are two matters to be considered. First, whether the term "*landlord*" ought not, as to this purpose, to extend to every person whose title is connected to and consistent with the possession of the occupier, and divested or disturbed by any claim adverse to such possession; as in the case of remainders or reversions expectant upon particular estates. Secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*; so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other. Where a person claims, in opposition to the title of tenant in possession, he can in no light be considered as landlord; and it would be unjust to the tenant, to make him a co-defendant: their defences might clash. Whereas, when there is a *privity* between them, the defence must be upon the same bottom: and letting in the person behind, can only operate to prevent collusion. It is no answer, "that any person affected by the judgment may bring a new ejectment;" because there is a great difference between being plaintiff or defendant in ejectment. In the case in *this* court, which was cited, the tenant in possession opposed both: in that in C. B. the tenant in possession had no sort of right. His Lordship mentioned a loose note in 12. *Mod.* 211. and the case of *Bedright v. Hart*. 2. *Sira.* 230.

MR. JUSTICE WILMOT thought the first part of the act was not introductory of a new law (for before the act a landlord might be made co-defendant); but that the second part of it was.

On behalf of the lord by escheat, it was further argued, that from the time of setting up casual ejectors, the admitting

ting landlords to defend together with the tenant in possession, had prevailed. In *Style* 368. H. 1652, it appears that both the courts of king's bench and common pleas would grant this to a person claiming title to the land. *1. Siderf.* 24. shews it was then usual. *Lilly's Abr.* 497. "One who hath title to the land in question may, upon motion to the court, be made defendant with the tenant in possession, that he may thereby defend his title," which continued to be the method of practice. That the act 11. G. 2. c. 19. was occasioned by the deficiency of justice in this method, in two respects. One was, the undertenant not acquainting his landlord. And the loose note in *12. Mod.* 211. (*Anonymous*) is the only case where the doctrine is laid down, "that if notice in ejectment be given to the undertenant, and he doth not acquaint his landlord therewith, but suffers judgment to go against him, the court (upon motion) will not suffer execution to be taken out till the right be tried." The other deficiency was that mentioned in *Goodright v. Hart*, where the tenant would not defend. That the former of the two clauses of the act provides against tenants secreting ejectments from their landlords. The latter of the two clauses consists of two parts. The first part of it only gives power to do what had usually been done before, viz. admitting the landlord to defend together with the tenant in possession. But the second part provides for admitting him to defend instead of the tenant, which had been, in some late cases, denied. See *Cases of Practice in C. B.* (by Mr. Cooke) 99. It was refused; nor would the court oblige the tenant to defend, even upon indemnification. So also in the case of *Balderidge v. Paterson*, the court denied to make the landlords defendants without the tenant in possession, who refused to appear: but they made the common rule, "to add them." In the case of

Duke of Montague v. Wrong, the court refused to admit the landlord to defend alone, *instead* of the late tenant, who had quitted possession: which cases gave rise to the second part of the act. They were all between the time of *Goodright v. Hart* and the making of the act. Since the act it was clear, that at least all persons might defend *without* the tenant in possession, who might, *before*, have defended *with* him. That the 12th and 13th clauses of the act were not relative to each other; the 13th being an independent clause.

Id. 175.

Barnardist.

413.

It was admitted, that many years before the act (9 W. Comb. 309, and M.) a rule was laid down by Lord Chief Justice Holt, "that no man should be admitted tenant or defendant in ejectment by the common rule, unless he had been in possession, or received rent; and not a mere stranger." But the reason of that rule did not hold in the present case: for a lord by escheat, defending his title, could never, by so doing, be considered as guilty of champerty (which was one of the reasons). However, the rule was inaccurately laid down in *COMBERBACH*. That the adding unnecessary defendants was prevented by 8. and 9. Will. 3. c. 11. (s. 1.) But before that act, lessors made several defendants in ejectment, in order to take off their evidence: and they could then have no costs, if acquitted. And the rule alluded to was made against lessors of plaintiffs, as well as against defendants; and means to exclude only mere strangers to the possession. In the case of *James, lessee of Pride, v. Carwithen*, Lord Bath, the reverend, was admitted co-defendant with the tenant, Id. 339. that a trustee may be admitted, if he desires it, though Id. 332. without his consent. So, a mortgagee. The true rule of admitting as a co-defendant, before the act, was, that a mere stranger should not be admitted: but a "person.

1. Salk. 257. "person not a mere stranger had a right to be admitted." In the case of *Underhill v. Durham*, it is said, "A landlord may be joined a defendant with the tenant in possession if he requests it: but the court cannot compel him to it." That a lord by escheat is not a mere stranger, but has the immediate right and title, in case no heirship be made out: and therefore the most proper person to contest that point of heirship, by whoever claimed; and might reasonably be considered within the word "landlord;" the tenant in possession being his tenant at will, if no heir be in existence. That a lord by escheat, is a title favoured even in the freehold, appears by Lord *Buckburys*'s case: much more should it be favoured in a copyhold case, where the freehold is never out of the lord. The tenant in possession is only tenant at sufferance to the lord by escheat, after the death of the last admitted tenant has been presented. And his not having been in actual receipt of the rents, is no solid objection. That there must be a trial of the title, before possession can be obtained, is a fixed principle. A motion was made for judgment in ejectment, upon a lease sealed on the land: and denied: for *per Cur*—"You must try it." Where the tenant suffers judgment without giving notice, &c. the court will not permit execution to be taken out, till the right be tried.

Comb. 13.

12. Mod. 211.

Comb. 13.

In the present case, a stranger might obtain the possession, unless the lord was admitted to defend his title. It was not worth the tenant's while to defend it; for his possession would be determined immediately, whichever side prevailed. Suppose it had been a vacant estate; the lessor of the plaintiff must have sealed his lease upon the land, and set up a casual ejector. But the court would not, in that case, have suffered execution to be taken out.

without a trial and making out his title. And the court would have permitted the lord by escheat to have seen that the title was well made out: consequently, the court would, in such case, have admitted the lord to defend, in order to oblige the plaintiff to go down to trial, and make out his title. And there was as much reason to do it, where the tenant deserts his claim. Suppose two persons, one claiming as heir, the other as lord by escheat, bring ejectments, and both recover judgment; how would the sheriff know to whom to deliver possession? Admitting the lord to defend, would prevent a circuitry of litigation.

LORD MANSFIELD. "We have thought very fully of this matter; and are all of opinion that it must be tried between the two claimants, the heir and the lord. The occupier has no interest in the question: he ought not to take a side, or prejudice either. He does not appear. The question should therefore be tried in a way to give neither any advantage from *his* possession. It may be done in a feigned issue; or, an ejectment brought by the lord, with an admission of his title, will come to the same thing." Whereupon the court recommended, and the counsel on both sides consented, to a fair trial of the title by escheat. The method at length agreed upon, was, that the lord (who never could come into possession without an ejectment to be brought by him) should immediately bring his ejectment against the lessors of the plaintiff; who (claiming as heirs) should be admitted to defend, either alone or together, with the tenant in possession.

THE court reserved the consideration of the motion, and of the rule depending, till after a trial should be had: which they did, in order to retain power over the matter, in case any thing should be attempted at the trial

contrary to the intention of having the question fairly tried; and also to give such future directions concerning the award of execution as should appear to be proper.

MR. JUSTICE WILMOT observed, it was very remarkable that two different acts of parliament had been made, at near 500 years distance, upon the same subject, where there was no occasion for either; *viz.* the statute of *Westminster* 2. (13. Ed. 1. A. 1285.) and 11. G. 2. c. 19. The statute of *Westminster* 2. c. 3. he said, was not a new provision. For before that statute, all those who stood behind the tenant in possession, had always a right, at common law, to come in and be received, *pro interesse suo*, to defend the possession; which was very material to them, by the change whereof they would have been greatly incommoded. And he said he was persuaded that the more the doctrine of *receit* was looked into, the stronger it would appear. He therefore wondered there should have been any doubt, before 11. Geo. 2. of admitting landlords to defend instead of the tenant in possession; especially as they were suffered to make themselves co-defendants with the tenants. He referred to Lord Coke and Bracton. So, before 11. G. 2. c. 19. it was the practice to admit the landlord and the tenant in possession, co-defendants. He took notice likewise, that notwithstanding all the pains which the legislature had taken to cut off *dilatories*, yet it was the court of *Westminster-hall* to whom the public were obliged for finding out the easy and expeditious method of trying titles by ejectment.

Brac. lib. 5.
fo. 393. b.
2. Luff. 344.

LORD MANSFIELD asked the counsel on both sides, "if they had found any case prior to that of *Goodright v. Hart*, where the court had refused to let in persons

who stood behind the tenant in possession, to defend "*pro interesse suo*, instead of the tenant in possession." They answered, they had not.—Lord Mansfield. Then there is no other but *that* which denies the authority of the case in 12. Mod. 211. The precedents *before* are more liberal. In 1655, it was said by the prothonotary, Styles 381. "that the court would, upon terms, allow him who *alleged* title, to defend in." In the 7th of King William, Lord Bath claiming the reversion by deed, after the death of tenant for life, who received the rent, was admitted defendant, because it might shake his title. Comb. 339. In the 10th of King William, it is laid down as a certain rule, "if notice in ejectment be given to an under-tenant, and he doth not acquaint his landlord therewith, but suffers judgment to go against him, the court, on motion, will not suffer execution to be taken out till the right be tried:" which is decisive, that the landlord should not be betrayed, but might defend alone. In the 1st of Queen Anne, Holt Salk. 257. says, "it is due *of right* to the landlord, to be made pl. 10. defendant; otherwise, the tenant in possession might 7. Mod. 701. combine with the lessor of the plaintiff, and oust the landlord of his rent: and to deny that right, would be directly to determine the point in question." The combination of the tenant in possession could not be prevented, unless the landlord might defend alone. And the rule is laid down in a case like the present, where the question turned upon "who was landlord." Thus stood the reasoning and practice, when the motion was made in *Andright v. Hart*. It seems to have been very little considered. The only reason given why the tenant might sue his landlords by refusing to appear ("because the landlord was made a defendant *against* the tenants in possession"), equally, at least, proved the contrary. It

was a breach of the rule in the tenant, to prevent his defending. No wonder Sir *John Strange* adds, "*quanti tamen*. For this is giving tenants much too great a power; and makes them absolute masters of the estate; and to choose their own landlords." The court refusing to relieve the landlord, he practised with the tenants to attorn. Then the plaintiff in ejectment moved; but was denied relief. So the court first suffered the plaintiff in ejectment, by corrupt practice with the tenants, to dispossess the landlord by a judgment, without any opportunity of trial; and then suffered the landlord, by corrupt practice with the tenants, to defeat the judgment: and possession given in consequence thereof. This case certainly occasioned the clause in the act of parliament relative to this subject. As the parliament has contradicted it, one may venture to say, "it was hasty." Every reason of private justice and public convenience, and every authority, was the other way.

A RULE by consent having been ordered to be drawn up, LORD MANSFIELD declared he was clear that the method of "putting the person claiming to be lord by escheat, to bring his ejectment," was the proper way of trying the right upon the merits. If there was real no heir, the lord stood in place of the deceased: but if there was an heir, the lord's claim was at an end. The court would have obliged him to come into some method of trying the right, in a proper issue. As the method into which it was put (*viz.* his bringing an ejectment), was the most proper issue for that purpose. If the heir had refused, the court would have admitted the lords to defend; which would have given them the benefit of possession. If the lords by escheat had refused to consent, the court would have discharged

the rule. For certainly, where the sole question turns upon "who ought to be landlord to the tenant in possession," he should stand neuter, and his possession avail neither: the question ought to be tried between the claimants. The plaintiff must consent: else, the other is admitted to defend. The other must consent: because, to insist "that he is landlord," begs the question to be tried.

At a subsequent period, it was said by LORD MANSFIELD, M. S. 1771. that when a person applies to be made defendant in the room of the tenant, it is not necessary that he should be the actual landlord; it is sufficient if he have an interest only in the land: it should seem therefore that a mortgagee, who is out of possession, may be admitted to defend, on the tenant's refusal; notwithstanding in one case it is said to have been otherwise determined.

As it has some time been decided, (*Moss v. Gallimore*), that a mortgagee, after giving notice of the mortgage to the tenant in possession, under a lease prior to the mort-

gage, is intitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and may distrain for it, after such notice; surely, he may be admitted, in an ejectment, to defend with the tenant; and in case he declines, even to defend without him. But the case of a devisee, not in possession, seems now, under the act, to be otherwise; as in *Norris v. Dancafter*; in which case it was moved to permit certain devisees to defend in-

stead of the tenant. In support of the motion, the case of *Fowler v. Shamtitle* was cited and relied on. The rule was opposed on the ground that the devisees had never been in possession, and could not therefore be considered as landlords, UNDER 11. Geo. 2. [without adverting to the act anterior to the act.] — LORD KENYON. If the person requiring to be made defendant, under the act, had

stood in the situation of *immediate* heir to the person last seized, or had been in the relation of remainder-man, under the same title as the original landlord, I am of opinion that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here, the very question in dispute between the adverse party and himself is, whether he is intitled to be landlord, or not; we therefore are not authorized to extend the provision of the statute to such a case as this. As to the case mentioned, it appears to have been by consent.—Rule discharged. BULLER, J. absent.

Ante, 130. **THOUGH** the rule eventually drawn up in *Fowler v. Sharnite*, was by consent, and different from the motion originally made, yet that was done in deference to the recommendation of the court itself, and for the avowed purpose of trying the right upon the merits; the court in express terms declaring, that if the heir had refused, it would have admitted the lord by *escheat* to defend. Of his right to defend, and that even as landlord, though he had never been in possession, the court had not, from the report, the least particle of doubt. All the cases which existed previous to the passing of the act; those in particular which were supposed to have given rise to it, were investigated and explained; it "being a point of great consequence to be settled." The result, after great deliberation, seems to have been, that by the practice, even anterior to the act, the term *landlord* extended not only to every person whose title was connected to and consistent with the possession of the occupier, and divested or disturbed by any claim adverse to such possession; but to persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*. Any person, in short, who was not a mere stranger, and had an interest to defend, was permitted in some cases *with*, in others *instead*

of the tenant in possession. That the court had no doubt upon the point immediately brought forward for its discussion, is evident from the terms in which LORD MANSFIELD is stated to convey its opinion:—"we have thought very fully of this matter (adds his Lordship); and are *Ante, 177.* all of opinion, that it must be tried between the two claimants, the heir and the lord. The occupier has no interest in the question. He ought not to take a side, or prejudice either. The question should therefore be tried in a way to give neither any advantage from his possession." When the cases *previous* to the statute (all of which are noticed in that of *Fowler v. Shantist*) are considered, it may be difficult to distinguish, as to the point in question, between the interest of a *remainder-man* and that of a *devisee*. Though the interest vary, yet each has an interest to sustain; and in that view not to be distinguished even from the case of the immediate heir himself. As to the *latter*, the court, in *Heblethwaite v. Roe*, permitted him, though he had never been in possession, to come in and defend. The father, under whom he claimed, died just before, having previously obtained a similar rule.

In a subsequent case however, (apparently between the same parties, *Norris v. Dancafter*,) the court permitted the *4. T. Rep. 122.* devisee in trust to defend as landlord, under the act. In this case it was said, that in the *former* one, the person who wished to defend was the *cestui que trust*, and could not therefore govern in the present instance.

BUT in no event will the court endure a lessee to defend alone *against* his landlord, or those who claim under him, on a supposed defect of title. In *Oxendon v. Laurence*, a *1. Blac. 1159.* verdict was given for the plaintiff, subject to the opinion of the court on a special case, which stated, that *John Har-*
rison,

rison, on 28th June 1732, devised the premises to his wife for life, and after her decease, to his daughter *Mary Pembroke*, for life, with remainder to his grand-daughter *Ann Pembroke*, and the heirs of her body, with remainder to his own right heirs for ever. *Ann Pembroke* married *David Lance*, and being in possession of the premises by the determination of the precedent estates for life, they on 20th April 1752, covenanted to levy a fine to the use of such person as they should jointly appoint; and in default thereof to them and the survivor for life, with remainder to such person as the survivor should by deed or will appoint; and in default of such appointment, to the right heirs of the survivor for ever. In Trinity Term 1752, a fine was levied. *Ann Lance* died 29th March 1753, not leaving any issue; and on 27th July 1753, *David Lance* demised the premises to *Giles Lawrence*, father of the defendant, for eleven years, from Michaelmas 1753, at the rent of 15l. *Giles Lawrence*, the father, paid rent to *David Lance*, who died on 17th November 1772; after which, the defendant, *Giles Lawrence* the son, paid to the lessors of the plaintiff (who were intitled under the will of *David Lance*) the rent due on 10th October 1772, but refused to pay any more; being forbid by *John* and *William Harrison* (heirs of the first testator, *John Harrison*), who claimed the estate; but had made no entry to avoid the fine. N.B. By the custom of Gavelkind, the husband of any woman dying seised of any lands of inheritance, is intitled for his life to a moiety of such lands whether she had or had not children.

On opening the case, the court (absent *Gould*) expressed their surprize, how the question intended to be tried, which was the right of *Harrison*, the heir at law against the devisees of *Lance*, came to be brought on so awkwardly, without making *Harrison* a defendant: since

the court would not endure, that *Lawrence*, the lessee of, or claiming under, the devisees, should defend an ejectment against his own landlords, on their supposed defect of title. But, as the case seemed to be clearly with the lessors of the plaintiff on the merits, the court would not merely upon that irregularity, give judgment for the plaintiff, which would only produce a new ejectment. They therefore called on the defendant's counsel to shew why the fine in 1752, which began to operate on one moiety in 1753, and on the other in 1772, with five years non-claim, and no entry to avoid it, was not a bar to any right which might be claimed by the *Harrisons*? And they not being prepared to answer that objection, judgment was given, without argument, for the plaintiff.

AND in all cases, if the person who wishes to defend be Sty. 161.
neither tenant nor *actual* landlord, but has some interest to sustain, he must move the court, on an affidavit of the fact, to be made defendant instead of, or with the casual ejector; but this, formerly, could only be done with the tenant's consent. For the reasons given in *Fowler v. Bramtill*, the consent of the tenant cannot be necessary.

As to the time when the landlord may be admitted defendant, the following case is material and remarkable, of *Troughton v. Roe*.— Judgment had been regularly obtained by the plaintiff against the casual ejector, by default; 4. Burr. 1996.
the landlord of the premises moved to set it aside, because his tenant had not given him any notice of his having been served with the declaration in ejectment. The plaintiff insisted that his judgment was perfectly regular; and that the tenant's omitting to give his landlord notice of the declaration being delivered, was merely a matter between the landlord and his tenant, which could not affect the plaintiff's regular judgment, which had been fairly

fairly and duly obtained. The court were however clearly of opinion, that the possession ought not to be changed by a judgment in ejectment, where there had been no trial or opportunity of trying; though the obtaining judgment might be owing to the default, or even treachery, of the defendant's own tenant. But if the plaintiff had not been guilty of any collusion with the tenant, they thought it reasonable that the tenant, who was the person guilty of the default, should pay the costs: for the rule of the court which requires service upon the tenant in possession, is calculated with a view that the tenant should give notice to his landlord, in order that the ejectment cause might be tried between the proper parties interested in the question. The rule was therefore enlarged; and an order made upon the tenant, to shew cause why he should not pay the costs upon its coming on again. The tenant, by his counsel, admitted himself to be in fault; and submitted to the court. The landlord was an infant, and therefore could not consent to the trial of the question (which was *heirship*), in an issue. But as relief was on his behalf prayed against a judgment which was strictly regular, no doubt could be entertained that the court might add such terms to the relief as were equitable, by bringing the real question between the plaintiff and him, to be tried upon the real merits. The court accordingly made the following rule, viz. "Upon reading the last rule, it is ordered that the judgment signed in this cause, and also the writ of possession issued and executed thereon, be set aside. And it is referred to the master, to tax the lessor of the plaintiff his costs occasioned by the judgment and taking possession, together with the costs of this application: which costs, when taxed, shall be paid by *Charles Douglas Bowden*, the tenant in possession of the premises in question. And it is further ordered, that *Henry Regnell Spiller, Esq.* the landlord

landlord of the tenant, be made defendant (as in the consent rule); and that he shall, upon trial of the issue to be joined between the parties, not set up any satisfied term or any trust estate, to defeat the lessor of the plaintiff; and also admit that *Zouch Troughton* was seised of the premises in question."

AND such a *new* defendant may give a rule to reply and nonpross the plaintiff, but cannot have costs: as in *Ward-v. Badtite*, it was moved to set aside a rule to reply.—The landlord had applied to be made a defendant, and had entered into the common rule; but the lessor of the plaintiff had never joined in the consent rule; it was therefore objected, that he could not be forced to proceed against a person whom he never had accepted as defendant. But the court, (absent DE GREY, Ch. J.) held the rule to be regular; and that the nominal plaintiff might be nonprossed thereby; but, being nominal, the defendant could have no costs.

WHERE there are several defendants, to whom the plaintiff delivers declarations, who are SEVERALLY concerned in interest, and the plaintiff moves to join them all in one declaration, yet the court will not do it; but the plaintiff must deliver several declarations to each of them: because each defendant must have a remedy for his costs, which he could not have if they were joined in one declaration, and the plaintiff prevailed only against one of them. And by this means the plaintiff might have a tenant of his own, defendant with others, in order to save the costs.

BUT where several ejectments are brought for the *same* premises, upon the SAME DEMISE, the court on motion

Barnes 419
edit. 176.

or

or a judge at his chambers, will order them to be consolidated.

HAVING seen what persons may defend, the next thing to be considered is, in what cases the defendant may claim security for his costs.

Barnes 4to
edit. 183.

Ser. 694. 932.
Hardw. 56.
1. Willf. 130.

Cowp. 128.

3. Burr. 1801.
4. Burr. 1997.
Ante. 186.
1. Black. 576

THE practice of making a rule to stay proceedings in ejectment, on the demise of an infant, until a responsible plaintiff be named, or security be given for the payment of costs, originated in the king's bench, and was afterwards adopted by the court of common pleas. By this practice, which is founded in justice, if an infant deliver a declaration to the defendant, some friend or guardian must be set up as plaintiff, to be responsible to the defendant for his costs. But if such person die insolvent, so that the defendant cannot derive any benefit from the rule, the infant himself must answer for the costs. The rule was entered into for his benefit: even an infant must not disturb the possession of others, by unlawful entries, without being liable to costs. Previous however to any motion in court, enquiry should be made, whether there be a real and substantial plaintiff, or not; for on enquiry, the guardian may undertake to pay the costs; and in case he should, the court would probably decline to interpose. The law, while it protects the imbecility of infants, enables them not only to do binding acts for their own benefit; and, without prejudice to themselves, for the benefit of others; but, at the same time, extends its protection also to the latter, against the unlawful or unjust pursuits of the former.

It has likewise been holden, that upon the death of the plaintiff's lessor, the proceedings may be stayed, till the plaintiff

plaintiff shall have given the defendant security for his costs. So where an ejectment was brought on the demise of a person residing at *Amigua*; and in another case where the lessor of the plaintiff resided in *Ireland*, the plaintiff was compelled to give the defendant a similar security. In the latter case he was compelled to do so, although it was an ejectment brought under the direction of the court of chancery, where the bill was retained till after trial of the ejectment, and security had already been there given: but that security was only for 40l. But (excepting such instances and that of a former ejectment), the court will not compel the lessor of the plaintiff to give security for the costs. This was ruled in *Selby v. Alston*. The lessor of the plaintiff had brought an ejectment in the court of exchequer in the year 1784, to recover possession of the same premises, for which the present action was brought, but abandoned the suit when it came on to be tried. A rule was obtained for the lessor of the plaintiff to shew cause why the proceedings in the last action should not be staid till he gave security for the costs, in case he should be nonsuited, or a verdict be given against him. The rule was obtained on an affidavit, which stated that in the former ejectment, the court of exchequer had obliged the lessor of the plaintiff to give security for the costs of that action. In shewing cause it was insisted, that no instance of a similar rule existed; and it was stated, that the reason why the court of exchequer had compelled the lessor of the plaintiff to give security, was, because it was alledged that he could not be found.—BULLER, J. This application is not warranted by any authority. The case in the court of exchequer does not apply here. There are only three instances in which the court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs. The first is, when an infant sues;

Barnes 416
edit. 147.
Str. 1056.
Cyford v. M.
Jones, 221. 222.
Hil. 33. Geo. 2.
B. R.
2. Burr. 1177.

1. T. Rep. 491.

Id. 267. 368.
and see
Comp. 24.

sues; then the court will oblige the *prochein amy*, or guardian, or attorney, to give security for the costs: secondly, where the plaintiff resides abroad, in which case the court will stay the proceedings till security be given for the costs: and thirdly, where there has been a former ejectment; but there the rule is to stay the proceedings in the second ejectment, till the costs of the former are paid, and not till security be given for the costs of the second. So that even the form of the present application is wrong. But it is not stated, that the costs of the former ejectment have not been paid. Rule discharged.—The latter instance is not confined to the action of ejectment, but is extended to other actions.

a.T.Rep. 511:

THE next thing to be considered is the COMMON RULE, or the rule to confess lease, entry, and ouster. Here it should be remembered, that judgment against the casual ejector is always granted, unless the tenant, in due time (that is, within the time allowed for his appearance), enters into the common rule, to confess lease, &c. But if the tenant, or his landlord, wishes to defend the action, he must, within that time, constitute an attorney, who will make out the common rule, and leave it, with the general issue, at a judge's chamber in the king's bench, or at the prothonotary's office in the common pleas. This rule is in substance nearly the same, in both courts; and the purport of it is, that the tenant, or other defendant, shall immediately appear, receive a declaration, plead not guilty, sin a plea of trespass and ejectment for the tenements in question; and that, upon trial of the issue, he shall confess lease, entry, and ouster, *and insist upon the TITLE ONLY*: the effect of the rule being, to bring the matter to the mere question of the plaintiff's possessory title.—See §viii.

It was formerly holden, that the confession of lease, entry, and ouster, was not a confession of any entry sufficient to make out the plaintiff's title, where an entry was necessary therunto; as where an entry was necessary to avoid a fine, or to take advantage of a condition broken. And in the case of an ejectment brought by one tenant in common against his fellow, the plaintiff was, notwithstanding the rule, put to the proof of an actual ouster. For though one tenant in common may disseise another, yet it must be done by an *actual* disseisin, not by the mere perception of profits. LORD HOLT however is reported to have said (but which I cannot credit), "if one of them only takes the profits, it is an ousting of the other." The law, from the earliest times, has uniformly been otherwise. SIR EDWARD COKE says, "albeit one tenant in common takes the whole profits, the other hath no remedy by law against him; for the taking of the whole profits is no ejectment: but if he drive out of the land any of the cattle of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have an *ejectione firme* for the one moiety, and recover damages for the entry." As to the profits, the legislature has since interposed its authority, and acted, that "actions of account may be maintained by one tenant in common against the other, as bailiff, for receiving more than comes to his just share or proportion." Hence it has been determined (*Harrison v. Harrison*), that a terre-tenant holding under two tenants in common, cannot pay the whole rent to one, after notice from the other not to pay it; and that if he do, the other tenant in common may distrain for his share. But if there have been many years of sole uninterrupted possession by one tenant in common, without accounting

Salk. 246.
Ld. Raym. 751.
7. Mod. 39.
3. Burr. 1897.

5. Burr. 2607.
3. Willf. 120.
4. Ld. Raym. 312.

Co. Lit. 199.b.
12. Mod. 567.
3. Willf. 119.

4. Ann. c. 16.
L. 27.
13. T. Rep. 148.

to, demand made, or claim set up by, his companion, a jury may presume (and it may legally be left to them so to do) an actual ouster of the co-tenant. In *Fisher and others v. Prosser*, on a motion for a new trial, Lord Mansfield reported as follows.— This was an ejectment brought by the plaintiff for an undivided moiety of lands, in Enfield, in the county of Middlesex. The lessors of the plaintiff claimed title under *Mary Taylor*, who was tenant in tail in common, of the lands, with her sister, under the will of one *Perkins*. The sister was married to *Stevens*; after which, in the year 1705, there was a deed of partition, between *Mary Taylor* and *Stevens*, for the life of *Stevens*; by which deed all the lands in Enfield were allotted to him, and under which he enjoyed them till the year 1734, when he died. *Mary Taylor* died some years before. From the year 1734, one tenant in common, namely, the wife of *Stevens*, had been in the sole possession of these lands, without any claim or demand by any person claiming under *Mary Taylor*, the other tenant in common. No actual ouster was proved, but upon the circumstances, I left it to the jury to say whether there was not sufficient evidence before them to presume an actual ouster; and supposing there was an actual ouster, in that case the lessors of the plaintiff were barred by the statute of Limitations. The jury found that there was sufficient evidence to presume an actual ouster. It is true, I told the jury, they were warranted by the length of time, to presume an adverse possession and ouster by one of the tenants in common, or his companion; and I continue still of the same opinion. Some ambiguity seems to have arisen from the term “actual ouster;” as if it meant some act accompanied by real force. But that is not so. A man may come in by a rightful possession, and yet hold over adversely without title. If he does, such holding over, under circumstances

will be equivalent to an actual ouster. For instance; length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title: but if tenant *par autre vie* hold over for twenty years after the death of *estui que vie*, such holding over will, in ejectment, be a complete bar to the remainder-man or reversioner; because it was *adverse* to his title. So in the case of tenants in common. The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay, *of itself*, sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole, will not pay, and continues in possession; such possession is adverse and ouster enough. The question then is, whether the possession in this case, after the death of *Stevens* in the year 1734, that is, after the particular estate ended, was a possession as tenant in common, *eo nomine*, or adverse? It is a possession of near forty years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper, namely, six years: but in this case, no evidence appears of any account demanded of any payment of rent and profits; of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession of such a length of time, is sufficient ground for the jury to presume an actual ouster, and that they did right in so finding.

ASTON, J. There have been frequent disputes as to how far the possession of one tenant in common, shall be said to be the possession of the other; and what acts of the one, shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession *as such*, and receives the rents and profits on account of both. With respect to the second, if no actual ouster be proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. Now in this case, there has been a sole and quiet possession for forty years, by one tenant in common only, without any demand or claim of account by the other, and without any payment to him during that time. What is adverse possession or ouster if the uninterrupted receipt of the rents and profits without account for near forty years, be not?

WILLES, J. This case must be determined upon its own circumstances. The possession is a possession of fifteen years above the twenty prescribed by the statute Limitations, without any claim, demand, or interruption therefore, after peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat it. However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster: and therefore I entirely agree, that under the circumstances which appeared at the trial, it was properly left to the jury to presume actual ouster in this case.

ASHHURST, J. I am entirely of the same opinion. Here is a possession of near forty years, without any claim by the lessors of the plaintiff to a share of the rents and profits, without any acknowledgment of his right by the other tenant in common. After so long an acquiescence

efcence, I think the jury were well warranted to presume anything in support of the defendant's title; and they might presume, either an actual ouster or a conveyance. With respect to the case of *Epsom v. Shackleton*, the present 3. Burr. 2604. question was not properly before the court in that case; the single question there being, whether the plaintiff was barred by the statute of Limitations. The possession was a possession of twenty-six years; but in that case, it was not left to the jury to presume either an adverse possession or an actual ouster. That fact therefore was not found, and it is not the province of the court, but of the jury, to presume facts. Here it was left to the jury, and the jury have presumed an actual ouster; and I think, after a quiet uninterrupted possession of forty years, they were well warranted in so doing.—Rule discharged.

Now, though there must be an ACTUAL entry to AVOID 3. Burr. 1897. a FINE, levied with proclamations, and the action upon 4. & 5. Ann. c. 16. s. 16. that entry must be commenced within a year afterwards, Ld. Raym. 750. and the demise laid subsequent to that entry, yet in 1. Sid. 223. all other cases, it has been said, the confession of lease, entry, 1. T. Rep. 741. and ouster, is sufficient.

In *Berrington v. Parkhurst*, on a trial at bar in ejectment, 21. Stra. 1006. a special verdict was found. The defendants, as disseisors, 1128. levied a fine in 1730. To avoid this, the lessor of the plaintiff made an actual entry on 6th January 1731, and in Hilary Term after, brought his ejectment, and laid the demise three months before the actual entry. It was insisted by the defendants, 1. that an actual entry was necessary to avoid the fine: 2. that the demise could not be laid before the lessor had regained possession by actual entry. To the first of these, it was argued for the plaintiff, that H. 7. c. 24. was in the disjunctive, "so as the claim is pursued by action or lawful entry;" that therefore the ejectment was sufficient, if the actual entry was out

1. Sand. 319.
1. Vent. 42.
1. Mod. 10.
2. Keb. 555.
Skiinn. 423

of the case. As to the second, it was argued, that upon the entry, the lessor's estate reverted, and he might maintain trespass for an act done during the disseisin; and unless he was allowed to lay his demise back, he could never recover the *mesne* profits. To which it was replied, that ejectments were not in use at the time of making the statute, and *real* actions only were intended; and if ejectments would do, all the questions which had been made about actual entries must have fallen to the ground, by the answer, that an ejectment was a suit which came within the alternative, those questions having all risen in ejectments: and that 30th January 1703, at a meeting of all the Judges (except PRICE), it was resolved, that in the case of a fine, there must be an actual entry within five years, and that the confession of an entry to deliver a lease in ejectment, should not operate to avoid a fine. And the act for amendment of the law, which says the claim or entry shall be of no effect to avoid a fine, unless an action is commenced within a year after, shews it must be an *actual* entry to be prosecuted with an action, and that the action is not the entry required. As to the second point, it was observed, that the constant doctrine has always been, that one out of possession cannot make a lease; therefore in verdicts it is always found, that the lessor entered, and was seised *prout lex postulat*. Here was a time when certainly the lease was void, *viz.* from the making to the entry; and the question in ejectment always is, whether the lessor could *then* make the lease; and *he is nonsuited if he lays the demise before his title accrued*; that supposing this may affect him as to the *mesne* profits, it is his own laches, and the owner is supposed to live upon them all the while. And upon this point the king's bench gave judgment for the defendants. On error in parliament, the Judges were all ordered to attend. Two questions were put to them: 1. Whether an *actual* entry

entry was necessary to avoid the fine? To which they all answered, that it *was*. 2. Whether, the demise being laid before the time of the first entry, the ejectment could be maintained? To which they answered, it could *not*. So without putting any question upon the merits, the judgment was affirmed, with costs.

FORMERLY, Chief Justice HALE allowed the confession of entry to be evidence of an actual entry, till the contrary appeared. That however was in the case of an entry under lease, by which the plaintiff claimed title, and not in the case of an ejectment delivered within the time prescribed by the statute. This determination of HALE, Baron GILBERT strenuously opposes. He says, "this practice is now totally disallowed, and an actual entry must be proved, where it is necessary to complete the plaintiff's title." Because the defendant is compellable by the court to confess lease, entry, and ouster; and therefore to make *that* a proof of an actual entry, which was extorted from the defendant, and upon that presumption to turn the defendant to prove the contrary, were to compel him to the proof of a negative, which in all cases is difficult, and in some impossible. Besides, the words of the rule are, that the defendant shall confess lease, &c. and insist "*super titulum tantum*," the intention of the court being that the tenant in possession should insist upon every thing which was necessary to the defence of his own title (and such is the denial of the plaintiff's entry in establishing his); therefore, it was a point which by the rule he might insist on, notwithstanding the confession. He then proceeds in the argument, with the following case.

Is *A.* let to *B.* and *B.* to *C.* to try the title, the confession of lease, &c. extends only to the lease made to *C.*

1. Vent. 248.

3. Keb. 213.

and not to that made to *B.*; because the confession, by the rule, extends only to the lease made to try the title, and not to the lease which is PART of the title of the lessor of the plaintiff. And HALE admitted this, when he ruled the entry to be confessed by the formal confession of lease, &c. For though he thought that where an entry was confessed, and a lease, as though it had been made upon the land, that thereby a claim was confessed to the fee-simple of the land itself (for a confession of entry to let, he understood to be confession of a claim of the fee-simple; because otherwise, there could be no power to demise, which is confessed by the rule): yet notwithstanding in this case, the lease to try the title being a distinct lease from that by which the lessor of the plaintiff claimed, he held that it must be proved. Lord Chief Justice HALE (continues GILBERT), when he held that the entry was sufficiently confessed by the rule, said, that otherwise an entry would be necessary to be proved on every disseisin. And indeed, before the new rule, an entry was necessary, in order to give the plaintiff power to make a lease. Afterwards it was otherwise, because an entry does not make part of the plaintiff's title, where the lessor of the plaintiff is disseised, for he had a complete title before the disseisin, which was an injury done to him, for which he might have recovered damages in an assize from the first act of disseisin. And the design of the new rule in ejectment was, without the formal preparation of an entry and lease, to bring the cause to as sudden a trial, and in as short a method, as had been formerly used in an assize. The law is, however, otherwise; and, respectable as the authority of Baron GILBERT is, it must, nevertheless give way to the decisions which have taken place upon this subject. In the case of *Harris v. Prichard*, it was determined that an actual entry is *not* necessary, to avoid a fine at common law, it being without proclamations. And

2. Wilf. 45.
Plowd. 265.

the Index to Serjeant *Wilson's* first volume of Reports (tit. *Entry*), it is stated that the lessor of the plaintiff made an actual entry in the month of *September 1744*, and in the declaration in ejectment, laid his demise in *October* following: that the defendant levied a fine in *1745*: upon which the court determined that he was not bound to make another entry. I cannot, however, find the case to which the Index refers. And in the case of *Wigfall v. Brydon* (which 3. Burr. 1895. was the case of tenants in common), no actual ouster was proved previous to bringing the ejectment. After verdict for the plaintiff, it was insisted, on a case reserved, that the rule to confess lease, entry, and ouster, did not supply the want of evidence of the actual ouster of the tenant in common,

THE court having taken a few days to look into the cases, LORD MANSFIELD delivered their opinion.

AFTER stating the case particularly, and the question, "whether an actual entry was necessary to have been proved, or whether the confession of lease, entry, and ouster, was sufficient, without actual proof of it," he observed, that as there was no proof of actual ouster, no actual ouster could be supposed; but that slight proof would be sufficient to be left to the jury. "However, though no actual ouster can be supposed, yet we are all of opinion that the confession of lease, entry, and ouster, is sufficient to bar a nonsuit, for want of proof of actual ouster. We are glad to have it settled, because there have been different opinions. The meaning of confessing lease, entry, and ouster, is, to bring the matter to the mere question of the plaintiff's possessory title. To avoid a fine, there must be an actual entry; and the demise can not be carried back beyond the actual entry. In all other cases, the confession of lease, entry, and ouster,

“ is sufficient. It is sufficient for an ejectment brought
 “ upon a condition broken. As to this particular case, of
 “ a tenant in common, there are cases to justify our opi-
 12. Mod. 657. “ nion.” He repeated the case of *Johnson v. Allen*. “ And
 “ indeed it is scarce possible,” he said, “ that a tenant in
 “ common should bring an ejectment, but where there had
 7. Mod. 39. “ been an actual ouster.”—*Per* HOLT. “ He shall not be
 “ compelled when he does not dispute the title: but where
 “ he does dispute it, he shall be compelled to confess lease,
 “ entry, and ouster. Therefore we are all clear, that the
 “ confession of lease, entry, and ouster, is sufficient in the
 “ case of a tenant in common, without proof of *actual*
 “ ouster.”

Doug. 2d v.
 8vo. 483.

So, in *Hare v. Cator*, it became a question, whether an
actual entry was necessary to take advantage, by ejectment,
 of the usual clause in a lease, to re-enter for non-payment
 of rent. LORD MANSFIELD.—“ I have always taken the
 “ distinction to be, that where entry is necessary to com-
 “ plete the title (as when power to re-enter is reserved,
 “ in case of non-payment of rent), there the confession
 “ of lease, entry, and ouster, is sufficient; but where
 “ it is requisite to *rebut* the defendant’s title, *actual* entry
 “ must be made. This is the case when a fine is to be
 “ avoided. In the case of *Dormer v. Fortescue*, which
 Law of N. Pr. “ was much argued, both in the king’s bench and in
 ed. 1775, p. 104. “ the house of lords, the counsel could not state
 2. Stra. 1086. “ another instance where actual entry must be made
 Andr. 125. “ The clause in the statute of Geo. 2. is very confused
 “ but I think it meant only to provide a remedy in cases
 “ of vacant possession, although other matters are thrown
 “ in. My opinion is, that actual entry was *not* necessary
 “ in this case. Surely that could never be the intention
 “ of the parties, where the right of re-entry is expressly
 “ reserved, if rent should be in arrear. We have looked

very particularly into the cases for two hundred years
back, and find great contrariety on the question, whether
an *actual* entry be necessary, to maintain an ejectment
on a clause of re-entry, for non-payment of rent:
but in the most distant period, the better opinion has
been, that it is not. This was Lord HALE's opinion,
and is mentioned as such, and as that of Lord Chief
Justice SCROOGES, by Lord HOLT, in the case of *Little* 1. Ld. Raym.
v. Heaton. But we look upon it as having been fully ^{750.}
settled, in 1703, by the opinion of all the Judges, upon ^{1. Salk. 259.}
deliberation and consideration of all the cases, that ^{Holt 264.}
actual entry is *only* necessary to avoid a fine. And so ^{Ante, 196.}
the practice has been ever since. The reason of
the thing is agreeable to the practice; for it is absurd
to entangle rights in nets of form, without meaning;
and an ejectment being a mere creature of the court,
framed for the purpose of bringing the right to exami-
nation, an *actual* entry can be of no service. In the case
of a fine, it is required by a positive rule of law, and
clearly necessary under the statute 4. Anne, c. 16.
§ 16.—It has also been contended, that a demand of
the rent was necessary. There seemed to be some
weight in that point upon the reason of the thing; and
on looking into the cases, it appears to have a found-
ation in authority. But here, by the express terms of ^{751.}
the lease, the demand is dispensed with. The act of ^{Cro. El. 15.}
4. Geo. 2. is very perplexed; but the meaning
only is, that where there is no stipulation in the
lease for entry without demand, you may, notwith-
standing, enter without demand; provided six months
rent be in arrear, and there is not a sufficient distress;
otherwise, in such cases, you must make a demand."

MR. DOUGLAS, in the third edition of his Report of ^{8vo. 2d v. 485.}
Hare v. Cator, adds a note, indicating a doubt whether
actual

Actual entry be not also necessary, to prevent the operation of the statute of Limitations, 21. Jac. 1. c. 16.; and after citing law of N. Pr. ed. 1775, p. 102. says, "so held on a trial at bar in *Ford v. Grey*, unless there be some special reason to the contrary." *Actual* entry is also (as he states) necessary, to enable a person who has recovered in ejectment, to maintain trespass for the mesne profits, against one who was occupier when the title accrued, but not at the time of the ejectment.

Co. Lit. 417.

WHERE an actual entry is necessary, the party who is to make it should formally and peaceably enter on the land, and declare that he thereby takes possession; or he may enter on any part of it in the same county, making a similar declaration in name of the whole: but if the lands lie in different counties, there must be several actions, consequently a separate entry for each.

1. Vent. 42.
2. Strind. 319.
3. Mod. 10.
4. Keb. 555.

If a man enter and deliver a declaration on behalf of the lessor of the plaintiff, this is no entry to avoid a fine, unless an exprefs authority be given to enter for that purpose; because the entry must be pursuant to the intention: which was, to deliver a declaration, in order to try the plaintiff's title, and not to make any title to the lessor of the plaintiff. But, as in *Fitchet v. Adams*, if a man enter on the premises, on behalf of the lessor of the plaintiff, though without any previous authority for the purpose, and the lessor afterwards assent to the entry, before the day of demise in the declaration, such assent will be adequate to an actual entry, and need not be either by deed, or in writing.

2. Stra. 1118.

Co. Lit. 447.
258.
9. Co. 106.
1. Rol. Abr. 738. pl. 2, 3.
4.

Salk. 259.

THE common rule being made by assent of both parties, an attachment lies for the non-performance of it, as of all other rules of court that are disobeyed; and this

is all the remedy which the parties on both sides have for their costs.

If there be several persons who claim title, the rule may be drawn either generally or specially: generally, as that *J. H.* who claims title to the premises in question, IN HIS POSSESSION, be admitted defendant for those premises. This puts a necessity on the plaintiff, to distinguish, by proof at the trial, what tenements are in each defendant's possession; because, by the rule, he is only to confess for the premises in his own possession: and if the plaintiff cannot distinguish, by proof, what tenements are in each defendant's possession, he can have no verdict, consequently no judgment. Or the rule may be drawn specially; as that *J. H.* who claims title to such and such premises (expressing them particularly), be admitted defendant; which supercedes the necessity of proof, that the premises are in his possession.

In the tenant enters into the common rule, for so much of the premises as are in his possession, his attorney must, by rule of court, *immediately* deliver to the plaintiff's attorney a note in writing thereof; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may summon him before a judge, who will order the rule thus specially to be drawn up, in case the party in possession will admit himself to be defendant. But because the defendant's attorney is to draw up the rule, it being entered into by his consent, it is often drawn up in general terms, which puts the plaintiff to proof at the trial. It is true, that the rule for judgment against the casual ejector, is drawn up by the plaintiff's attorney, yet that is only for judgment against *such* ejector, in case the tenant in possession do not enter into the common rule by a limited time;

Reg. Trin.
15. Car. 2. B. R.
1. Keb. 677.
Lil. Pr. Reg.
497.

time; which puts it upon the defendant to draw up the common rule, and leave it at a judge's chambers in the king's bench, or at the prothonotary's office in the common pleas, and to give notice of it to the plaintiff's attorney, that he may proceed.

THE rule is, that the tenant shall immediately appear and receive a declaration, which supercedes the necessity of an original writ in the common pleas; because the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unless in a writ of *error*: but when a writ of *error* is brought, the plaintiff must file an original, unless it be
 15, El. c. 24. after verdict, when it is helped by statute.

AND as in the common pleas there is no need of an original, so in the king's bench there is no necessity for a *latitat*, or bill of ejectment; but the party must file BAIL before he can proceed. He must also file a bill of ejectment, besides the plea roll, in case a writ of error be brought, before errors are assigned. The reason is, that the court has no authority to proceed in ejectment by bill, unless the defendant be in custody; therefore by the rule, bail is ordered to be filed, that the court may have authority to proceed. They do not however file a bill in the office against such person as a prisoner of the court, suggesting that he is delivered to bail, because he is bound by the rule to receive a declaration, and so they need only make up the plea roll, until a writ of error be brought; though they must file their bill of ejectment; because in the writ of error no notice is taken of the rule, and therefore a bill must be filed against the person, as a prisoner of the court, that a proper person may appear to the superior jurisdiction, and a proper suit be commenced against him.

YET

YET in the king's bench they may proceed by original, as well as by bill; because in like manner as they may proceed against any person privileged or bailed by the court, so also may they proceed by original in that court (because it is an action of trespass, which is originally cognizable by the court, it being a criminal cause, for which there was formerly a fine due to the king); and then there is a declaration delivered as in the common pleas.

THERE is this benefit in proceeding by original in the king's bench, that no writ of error lies but in parliament, and the writ of error cannot be allowed but in the interval of parliament. The reason is, because no writ of error lay out of the court in which the king was supposed to preside in person, but to the legislature; and the king was supposed to preside in the court where criminal offences were punished, because it was part of his high office to preserve the public peace by animadversion on criminal offences. But when the court of king's bench had acquired jurisdiction in civil causes, by way of privilege, relating to the prisoners of their own court, it became necessary, that the subject should not be disappointed of his writ of error, either by the not sitting of parliament, or by its being employed in public business when it did sit; therefore the statute of the 27. Eliz. c. 8. gave a writ of error in the exchequer-chamber in civil actions, among which are ejectments, but excepts the case WHERE THE KING IS PARTY. And the king (says GILBERT) "is supposed to be party, in all actions which punish trespasses in a criminal manner, as the ejectment is when it commences by original writ, returnable in the king's bench; therefore there lies no writ of error but in parliament on a judgment given *in banco regis* upon an original."

THE

THE reason offered by GILBERT, why a writ of error does not lie in the exchequer chamber, on a judgment in ejectment by *original writ* in the king's bench, is not by any mean conclusive. The true, and perhaps the only reason for a distinction in the case, proceeds from the act of Elizabeth, which gives the appeal, by writ of error, to the exchequer chamber, in such actions only as are FIRST commenced in the king's bench: therefore it is, that though a writ of error will lie in the exchequer chamber, on a judgment in ejectment by BILL, which originates in the king's bench; yet it is otherwise, where the ejectment is commenced by ORIGINAL WRIT, for that issues out of chancery, where the action in that case is first commenced.

Reg. Trin.

14. Car. 2.

Mich

33-Car.2.B.R.

FORMERLY, the court published a rule, that they would not permit any person to take judgment against the casual ejector without a certificate that a *latitat* had been taken out, and bail filed; because the court had no authority to proceed without the defendant appeared to be a prisoner of the court, unless by original. But now such motion is granted without a certificate; and it is sufficient if bail be filed for the casual ejector, after the rule for judgment be drawn up. Bail however must be filed for the casual ejector, before you can oblige the tenant in possession to accept the declaration, since there is no cause in court against the casual ejector, in whose place the tenant in possession comes, till bail be filed against him; therefore he is not obliged to accept a declaration, or to confess lease, entry, and ouster, at the trial, till bail be filed. And if no such bail be filed for the casual ejector, and the plaintiff goes to trial against the tenant in possession, the court will set aside any judgment given against the casual ejector.

2. Show. 249

BUT

BUT where no bail was filed in ejectment, and a writ of error was brought, and it appeared by the attorney's books, that the attorney had his fee to file bail, but was since dead, the court ordered bail to be filed *nunc pro tunc*, that no error might appear upon the record; because as it was on the part of the defendant to file bail, therefore he should not be allowed to take advantage of his own error: and though the plaintiff proceeded without any bail filed by the defendant, yet as the defendant's attorney had had his fee to file such bail, and as there was no proper remedy against the defendant, because he had given the fee, nor against the attorney, because he was dead; it therefore became the justice of the court to set it right, that the plaintiff might have no mischief.

BUT there is now no necessity for a *latitat*, because when the casual ejector files common bail, he admits himself to be a prisoner of the court; for his being admitted out to bail, implies that he was once a prisoner: and whether he came into court regularly by *latitat*, or not, yet the judgment is not *coram non judice*. For instance, if the casual ejector accept a declaration, pleads, and judgment be given against him, the same is recorded; it appears thereby, that he has taken a declaration, as a privileged person. So if the tenant in possession make himself defendant, and accept a declaration, he must file common bail according to the rule: but there is no need of a *latitat*, because the *latitat* is no part of the record; since, by filing common bail, he acknowledges himself to be a privileged person, when the suit has as good a commencement as though it were by bill.

NEXT of the DECLARATION in ejectment; and *first*, of laying the demise, entry, and ouster.

THE

2. Str. 1087.
 1. Bur. 119.
 4 T. Rep. 680.
Ante, 196.

THE demise must be laid on some day *after* the commencement of the lessor's title; for the question always is, whether the lessor could *then* make the lease: therefore, where an ENTRY is necessary to compleat the title, as to avoid a fine, the demise must be laid on a day *subsequent* to the entry, or the plaintiff must be nonsuited. But it is usual to lay the demise as far back as possible; for then the judgment in ejectment will be conclusive evidence for the plaintiff, in an action for the mesne profits.

Ante, 118.

IN copyhold property, the title has retrospective relation, from the time of admittance to *that of surrender*, against all persons, except the lord; the surrenderee therefore may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance.—See the case of *Wollams v. Clapham*.

Lil. Pr. Reg.
 503.

THE demise should also regularly be laid on some day before delivery of the declaration; but if a man delivers a declaration against the casual ejector, as of Easter Term, which must be delivered before the esoin day of Trinity Term, and the plaintiff's title arises after Easter Term,—if the tenant in possession comes in and accepts a declaration, it must be of Trinity Term, and then the plaintiff will be able to shew a good title on that declaration of Trinity Term, which will be after his title accrued; for the declaration, which was of Easter Term, being against the casual ejector, is perfectly out of the case:—the defendant proceeds to issue upon a declaration of Trinity Term, which is after the plaintiff's title accrued: and if the defendant will not proceed to issue, and confess lease, &c. he has no remedy; for the plaintiff can take judgment, upon the declaration against the casual ejector to which the defendant is not party.

So, where the plaintiff declared on a demise, which in point of time was impossible, the court, after verdict, overruled the objection. That was the case of *Baker v. Cole*, 2. Bur. 2159, which certainly went a greater length than any other upon the subject; but was apparently decided upon this principle, that in the fictitious remedy by ejectment (in support of which the court will go to the utmost extent), no nice objection should prevail. And in the case of *Wrangham v. Hersey*, the lessor of the plaintiff claimed by descent 3. Wils. 274, from his ancestor, who died on the 1st day of January 1771, at five o'clock in the morning; the demise was laid in the declaration on *that* day, to hold from the 31st day of December preceding. After the merits had been gone into at the trial, it was objected, that the lessor of the plaintiff had no title, *at the time of the demise*, which appeared to be made when his ancestor was living; for he did not die until five o'clock on the 1st of January, so was alive that day: but the plaintiff having clearly made out and proved his title, the judge directed the jury to find a verdict for the plaintiff, which they did accordingly. It was moved to set aside the verdict, because the ancestor from whom the plaintiff claimed by descent, was living on the 1st of January 1771, till five o'clock in the morning; and there not being any fraction of a day, in fiction of law, he was alive all that day, and the title could not accrue until the beginning of the next, namely, the 2d of January. But *per TOTAM CURIAM*, If my ancestor die at five o'clock in the morning, I enter at six, and make a lease at seven o'clock, it is a good lease. It is said there is no fraction in a day, but this is a fiction in law: *fictio juris neminem ledere debet*, but aid much it may; and this is seen in all matters where the law operates by relation and division of an instant, which are fictions in law. A constable takes one who had struck another, and then sets

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him at liberty; the party stricken dies of the stroke; this is felony *ab initio*, but not to prejudice of the constable who suffered his escape. 11. Hen. 4. 12. b. pl. 26. a fine is levied *surrender*, the conusee by fiction in law hath seisin in an instant to make this render back, but to no other purpose in prejudice of the conusor; for the conusee's wife shall not have dower, nor shall the land be subject to any statute, &c. in which the conusee was bound. See 2. Rep. 70. *Lord Cromwell's case*.—If a man were born the 1st of February, and lived to the 31st of January, 21 years after, and at five o'clock in the morning of that day make his will, and dies by six at night, the will is good, and the devisor of age, 2. Ld. Raym. 1096. In an action for disturbance of common, an exception was taken to the declaration, that the demise to the plaintiff was alledged to be on the 26th of March, and the tort supposed to be on the 1st of May following, and not alledged that the plaintiff entered before the 1st of May: but to this it was answered by the court, that it shall be intended that he entered immediately after making the lease, 1. Lutw. 108. And see 2. Burr. 1162. *Baker v. Cole*, where amendments in ejectment are carried much further than formerly. First, a verdict cures a defect in setting out the title though it cannot cure a defective title. Secondly, after verdict, if an objection be grounded on the mere mistake of the clerk, or a trifling nicety, there is no need of any actual amendment at all; the court will overlook the exception. By fiction in law, the whole Term, the whole time of Assizes, and the whole Session of Parliament, may be and sometimes are considered as one day, yet matter of fact shall overturn the fiction, in order to do justice between parties.—The rule to shew cause why the verdict should not be set aside, was discharged.

So, in the case of *Smallwood v. Strother*, the demise stated ^{a. Blac. 706.} that one *Mary Smallwood*, at *Hafswell* in the county of *B.* demised to the plaintiff two messuages, &c. After verdict for the plaintiff, it was moved in arrest of judgment, that no *vill* was mentioned in which the demised lands lay. But on shewing cause, it appearing, that in the subsequent part of the declaration, it was stated that the defendant, at *Hafswell aforesaid*, ejected the plaintiff from the lands, &c. the court held, that this amounted to a sufficient certainty that the lands lay in the *vill* of *Hafswell*; and discharged the rule.

It was formerly holden (in *Swadling v. Piers*), that Cro. Jac. 613, if an ejectment be brought for TITHES, the plaintiff must declare on a demise by deed; because *tithes* cannot pass without deed. But at a subsequent time, an eject- Ld. Raym. ment being brought on a demise by a corporation, the ^{136.} court adjudged that the plaintiff need not declare on a ^{Carth. 39b.} demise by deed; because ejectments are grounded on ^{Ante, 150.} fiction: and HOLT, Ch. J. added, "at this day, the case of 2. Cro. 613. is not law."

WHERE the title is in several persons, who are severally concerned in interest, it is usual to declare, by several distinct counts, upon several demises; therefore, when a term is limited to trustees, for securing the payment of an annuity, or portions, &c. though the trustees seldom act, yet it is usual to declare upon their demise, ^{Post,} and also upon the demise of the *cestuy que trust*. By this means, in such and in similar cases, the plaintiff is not confined to *one* demise, but may resort to any other which he has stated, and under which he may be able to prove a title. And where several demises are apparently inconsistent, the court, to assist the title of the lessor of the plaintiff, would perhaps permit him to enter a *nonpross* as

1. Willf. 1.
2. Stra. 1180.

to all the demises but that which he can legally sustain: and after verdict, if by any means the plaintiff can be supposed to have title, as stated in his declaration, the court will support it. As in *Morris v. Barry*, in error, from *Ireland*. The declaration stated, that *Hen. Murry*, on 3d March 1740, demised one castle, 50 messuages, &c. *cum pertin'* to the plaintiff, *habendum* to plaintiff from the said 3d day of March, for eleven years; also that *Lady Middleton*, on the same day and year, demised the same premises to the plaintiff, *habendum* for the same term; by virtue of which demises, plaintiff entered and was possessed until the defendant ejected him: upon not guilty, a verdict was found for the plaintiff; and the entry of the judgment was, that the plaintiff "do recover his said " *terms* (in the plural) of and in the said tenements, &c."

UPON the common errors assigned, it was argued for defendant in the original cause, that the judgment was erroneous; because, as both demises were of the same date, of the same lands, and for the same term, both lessors could not have title at the same time; therefore the plaintiff below could not enter by virtue of both demises: so that, on his own shewing, he could not have right to recover both terms, and that no intendment could make it good. For the defendant in error it was insisted, that if by any means the judgment could be sustained, the court would do it; and this case was put to shew that the plaintiff might *possibly* have a title, as laid in the declaration, *viz.* that if there be two joint-tenants, and one of them makes a lease of the whole land at one, and the other a lease of the whole land at another time of the day, the moiety of each joint-tenant would only pass; and in such case, the plaintiff could not have declared more properly than he had; he could not have declared on a single demise. In ejectment, on two demises

of different lands, laid so as to be two different demises, *Worral v. Beck*, Mich. 3. Geo. 2. the judgment was, that plaintiff *do recover his term*; the objection was, that it should have said, that plaintiff *do recover his terms*, in the plural; but the court in that case said, they would extend the word *term* to his *term* in *A.* and his *term* in *B.* and judgment was for the plaintiff.

LEE, Ch. J. If by any means the plaintiff can be supposed to have title as laid in the declaration, as this is *after* verdict, we will hold the judgment to be right; and there is no inconsistency, but that two leases for the same term, and of the same land, may be good; for two joint-tenants, in the case supposed, each of them, as they are seised, *per my et per tout*, may make a lease of the whole, although his moiety will only pass; and they will be several terms, as they arise from the several interests of several persons, though they are the same in point of duration. In *Fisher v. Hughes*, in ejectment, upon *three* 2. Stra. 908. demises by several lessors of the same premises; as to *two* demises, judgment was entered for plaintiff; as to the other demise, it was entered for the defendant: the objection was, that there was judgment both for the plaintiff and defendant; but the court held the judgment right; and this was by writ of error from the grand sessions in Wales.—Judgment affirmed.

THE plaintiff in ejectment declared upon two demises, Carth. 224. of several lands, by several parties, but laid only one *habendum*, viz. *habendum tenementa prædicta*, so demised by 2. Vent. 214. the aforesaid several parties, for seven years; it was assigned for error, that the declaration was ill for want of another *habendum*, for that the verdict is general, and it is uncertain to which demise the single *habendum* relates. Comb. 196. The court held, that, *reddendo singula singulis*, it was well enough. Ld. Raym. 561.

Ante, 24. 42.
3. Burr. 119.

ANOTHER rule is, that though the plaintiff by the new method is not obliged to make an actual entry, or a real lease, yet he must lay the commencement of the supposed lease in his declaration, *preceding* the ouster and ejectment by the defendant; because the wrong complained of by the plaintiff is, that the defendant entered upon his possession, which he hath title to by virtue of the demise mentioned in the declaration; therefore, if the ejectment and ouster should be laid before the commencement of the lease, though such ouster be wrong, yet the plaintiff ought not to complain of it; because it was no wrong to him, inasmuch as, by his own shewing, it was done before his title commenced.

Yelv. 182.

THUS formerly where the plaintiff declared on a lease, made the 27th of April *anno primo regis*, and laid the ouster on 26th of April *anno primo predicto*, it was held to be bad; because it was plain that the plaintiff had no title till the 27th, therefore the ouster on the 26th was said to have been no trespass to him.

1. Sid. 8.
3. Mod. 198.
Comb. 83.
Cro Jac, 258.

So, it has been said, if the lease had been made 27th of April, *habendum à dicto* 27th April, or *à die datum*, *virtute cujus* the plaintiff entered, and was possessed till the defendant *postea, eodem 27 die Aprilis*, did eject him this would have been bad: because the ejectment was before the title commenced, for the lease did not commence till the 28th of April. But if the lease be made on the 27th, *habendum* from thenceforth, or from the sealing and delivery, or from the date, there the ejectment may be laid on the 27th, because the lease commences on the 27th, and an ejectment may be the same day on which the title commences.

5. Co. 1.
Co. Lit. 46. b.
4. Leon. 144.
Cro. Jac, 135.
258.

As the lease is now altogether considered as a fiction, in this action, the cases cited cannot have much, if any, applicability, at present. And as to real existing beneficial leases, the distinction between "*from the date*," and "*from the day of the date*," no longer exists; the court of king's bench having, in the case of *Pugh v. the Duke of Leeds*, determined, after great deliberation, that both expressions should be construed indifferently, either inclusively or exclusively, so as to give effect to the deed in which they are used: that "*from*" may, in vulgar use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*: that the parties (in the case cited) necessarily understood and used it in that sense, which made their deed effective: and that courts of justice are to construe the words of parties so as to effectuate their deeds, not to destroy them; more especially where the words themselves abstractedly may admit of either meaning. Therefore it should seem that, at this day, the former of the two last cases is not law; and that, were it to be decided again, it would meet the same decision with the latter.

Cowp. 714.
Doug. 8vo. 52.
1. Wils. 171.
177.
2. Wils. 165.

AND that a lease may commence at one day, in point of computation, and at another, in point of interest, is manifest from the case of *Enys v. Donnithorne*. And such a lease, to hold from a day past for 50 years then next ensuing, the said term to commence and begin from and immediately after the determination of an existing lease of the same premises,—was not esteemed uncertain in its commencement. And under circumstances which mark the *intent* of the parties, if the words of an agreement impart an *immediate* LEGAL demise, the court will construe it a good lease *in presenti*, and support it as such; as in *Abrahall v. Browne*, ante, 27.

2. Blac. 973.

Cro. Jac. 312. BUT the law does not necessarily oblige the plaintiff expressly to mention the day of the ouster, so that it appear to be after the term commenced, and before the action brought; therefore where the declaration was on a demise, the 25th of March *primo regis*, for three years; by virtue whereof the plaintiff entered, and was possessed until the defendant *postea*, viz. *anno supradicto* entered and ejected him, without specifying the day of ejectment, this was held good on error; for the action being commenced *secundo regis*, and the ejectment laid to be *primo*, it was plain from the declaration, that the ouster and ejectment were after the plaintiff's title commenced, and before the action brought.

2. Rol. Rep. 466. BUT see Cro. El. 766. contra. NEITHER was the plaintiff, even anciently, as it seems, necessarily obliged to alledge the particular day of his entry in the declaration; and therefore where the plaintiff declared on a lease to commence at a future day, *virtute cujus* he entered, and was possessed till ejected by the defendant, this was held good on a writ of error; because, as it was said, he entered by virtue of the lease, which could not be before it commenced; for he could not enter by *virtue* of the lease till the lease commenced. It might, however, have been otherwise, if the declaration had been *prætextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under *pretence* of the lease.

Jenk. 341. Cro. Jac. 311. THE plaintiff declared in ejectment in the common pleas, and after imparlance, as the course of the court then was, made a second declaration; if in such case the plaintiff, by the first declaration, had laid the ejectment and ouster before the commencement of his term, or omitted any matter of *substance*, though the second declaration were right, and the ouster were laid after his term commenced,

enced, yet the plaintiff could not recover; because the declaration on the imparlance-roll was the material one on which the action was grounded, and must have been supported by it; and the plea-roll was but a recital of the other, and therefore began with an *alias prout patet, &c.* ^{2. Rol. Rep. 153.}

AND though the declaration in law relates to the first day of Term, because the Term is in law considered but as one day, yet the plaintiff might declare on a lease made some time after the first day of Term, and recover thereon. Still it was necessary to make it appear, that the declaration was filed after the day of commencement of the supposed lease, otherwise the complaint would precede the title. And if the time of filing were not examinable, the act of law, which makes the relation to the first day of the Term, would have operated as an injury to the plaintiff, and a delay to his right; for then a man ejected out of a lease made in Term time, could not complain till the Term was over. ^{2. Vent. 174. 1. Sid. 431. Carth. 288.}

THE plaintiff declared on a lease made the 6th of *May* ^{Yelv. 182.} *anno septimo*, and was thereby possessed *quousque* the defendant ^{Cro. Jac. 154. but see} *poslea*, on the 18th *ejusdem mensis anno sexto supradicto*, ^{Carth. 401.} ejected him; it was objected, in arrest of judgment, that the ejectment was laid to have been a year *before* the commencement of the lease: but, at that day, the declaration was allowed to be good; because the ejectment was laid to be on the 18th *ejusdem mensis*, which could not be if it were done in the SIXTH year; therefore the court rejected the word *sexto*, as inconsistent and void.

So, in another ancient case, which was much stronger than the former, where the plaintiff declared on a lease made the SIXTH of *September 2. Jac.* and that he was ^{Cro. Jac. 96.} pos-

possessed, until the defendant *postea, scilicet*, on the FOURTH of September 2 Jac. ejected him, the declaration was holden good, and the words under the *scilicet* were rejected as surplusage. This case was afterwards recognized in another equally strong, which was an action of trover, where the conversion was laid, under a *scilicet*, before the supposition, and the court adjudged the *scilicet* to be void.

Ibid. 428. Cro. Jac. 662. So, where the declaration was of a lease of the 22d of May, *habendum à primo die Maii* for three years; *virtute cuius* the plaintiff entered and was possessed, *quousque postea viz. eisdem die & anno*, the defendant ejected him; this, on a writ of error, was allowed to be a good declaration though it was insisted, that *eisdem die & anno* must refer to the first day of May, which was the last antecedent, and then the ejectment was laid to be twenty-one days before the lease was made: because, the lease being made the 22d of May, and it being stated that the plaintiff afterwards entered by *virtute* thereof, the ejectment *eisdem die et anno* must refer to the day when the lease was made, or there could be no ejectment of the plaintiff. And in matter of right, where there doth not appear a direct contradiction the Judges follow the reason of the thing, rather than adhere to a rigid grammatical construction of the words of a declaration.

Salk. 323. Cro. El. 606. The plaintiff in ejectment declared, that J. S. by indenture dated the 9th of June, without saying when it was made or delivered, did demise, &c. *habendum à die data sigillationis et deliberationis indenturæ prædictæ*; *virtute cuius* the plaintiff entered and was possessed, till the defendant the same day ousted him. It was moved in arrest of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the sealing and delivery, being mentioned in the declaration.

yet judgment was given for the plaintiff; because after a verdict it shall be intended not only to bear date, but also to have been sealed and delivered on the day mentioned in the declaration, which was the 9th of June; for all deeds are presumed to be delivered on the day they bear date, till the contrary appear.

BUT where the limitation in the lease was altogether uncertain, the plaintiff was not permitted to recover; because where the commencement of the lease was uncertain, the lease was void in itself, and then the plaintiff could not have title. Besides, the court could not possibly perceive, whether the ejectment was before or after the plaintiff's title accrued, if such an uncertain lease could give him one. Otherwise it was, where the limitation or commencement was impossible; for in such case the lease commenced from the delivery, as if it had no date; and then the court might judge whether the ejectment was laid before or after the commencement. And there was this further reason for the difference, that 1. Mod. 180. the impossible limitation was rejected, because it could not be part of the agreement or contract; but an uncertain limitation was part of the contract, though it vitiates the whole agreement, because the court could not reduce it to any certainty.

THUS where the plaintiff declared on a lease *habendum* Heil. 63, *à die datus indentura prædicta*, without mentioning an indenture before, this was held bad, for the uncertainty when the lease commenced.

BUT if the plaintiff had declared on a demise to him *per quoddam scriptum obligatorium habendum à die datus indentura prædicta*, this had been good; because *scriptum obligatorium* shall be intended an indenture.

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Cro. El. 286. THE plaintiff declared on a lease of the fourth part of a house, in four parts to be divided; by force of which he entered *in tenementa prædicta*, and was possessed, till the defendant ejected him *de tenementis prædictis*: it was objected in error, that the plaintiff had laid the ouster to be of more than, by his lease, he had a title to; for the ouster was *de tenementis prædictis*, which at least must be understood of the whole house, and the lease was only of the fourth part: but the objection was over-ruled, because *de tenementis prædictis* shall be intended only of the fourth part of which the lease was made; besides, it was but just he should recover as much as he had title to, though he had laid his ejectment for more,

Cro. El. 890. THE plaintiff declared on a demise made the 16th day of January, by an indenture dated the 2d day of January, without saying *primo deliberat* the 16th; yet the declaration was held good: for though all indentures shall be presumed to be delivered on the day they bear date, unless the contrary be shewn; and therefore this lease must commence the 2d day of January, which, if true, would be a different lease from what the plaintiff declared on; yet because the plaintiff hath declared on a demise the 16th, it must necessarily be intended that the indenture was delivered on the 16th, because it cannot possibly be a demise before the delivery; and therefore the delivery must necessarily be intended to have been on the day when the demise is said to have been made, and not the day of the date of the indenture.

Cro. El. 773. BUT where the plaintiff does not make mention of any particular day when the demise was made, but only in general says, that J. S. by his indenture bearing date the first of January, did demise to him, so that it doth not appear, by the plaintiff's own shewing, when the lease com-

2. Leo. 117.

3. Leo. 266.

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commenced; the law in such cases construes the delivery to have been on the day it bears date; and so the declaration was held to be good, and not void for the uncertainty of the commencement of the lease, as was objected.

THOUGH by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration (as by the ancient practice in most of the cases cited he was obliged to do), for that is *now* confessed by the rule, and by that means the mischief of any variance, between the lease declared on and that produced and proved on the trial, is avoided; which was a danger the plaintiff was exposed to, and often miscarried in, by the old method of proceeding; yet in the modern practice the plaintiff must take care so to declare as suits with the real title to be sustained at the trial. So formerly, if there were several lessors, and the declaration was *quod demiserunt*; the plaintiff was bound to shew in them such a title that they might demise the whole; for the word *demiserunt* must be taken in pleading according to the legal sense it bears. So that if any of the lessors had not a legal interest in the WHOLE premises, he could not in law be said to demise them, for it was only a confirmation, where he was not concerned in interest; and therefore the confession of the joint lease did not help, because he did not confess *the title*, by the rule. It must not only be proved that the lessor of the plaintiff has title to the premises in question, and a legal right to enter and recover the possession, but, as before observed, that he had such right *at the time of the demise*, as stated in the declaration. Cro. Jac. 166.
Ante 217.
3. Term Rep. 13.

So, where the plaintiff declared on a lease made by *A.* Co. Lit. 45. a. and *B.* and it appeared on the trial that *A.* was tenant 6. Co. 14. b.
Poph. 37. for life, remainder to *B.* in fee, this, on a special verdict,

was adjudged against the plaintiff; because it could not be the lease both of *A.* and *B.* to pass the land in *present* to the plaintiff; for during the life of *A.* it could only be his lease, because he was the tenant in possession; and *B.* joining in the lease amounted only to a confirmation but could pass no interest during the life of *A.*: therefore the allegation that *A.* and *B.* did demise, was not proved.

1. Show. Rep.
342.

THE plaintiff declared on a lease made by *A.* and *B.* and on the trial it appeared that they were tenants in common. The plaintiff did not recover; but if *A.* and *B.* had been joint-tenants, a joint lease to the plaintiff had been good and he might have declared *quod demiserunt*. So in the

2. Will. 232.

case of *Worthington v. Weston*, in which there was a verdict for the plaintiff, subject to the opinion of the court, upon a special case of title, which was twice argued, wherein several points were debated, but at last were reduced to the single question, "whether tenants in common can make a joint demise?" the lease in the declaration being laid to be of the joint demise of the plaintiff's lessors, who appeared to be tenants in common. After time taken to consider, the court were of opinion,

Cro. Jac. 83.
166.

Comb. 2. 190.

1. Brownl.

39. 134.

Co. Lit. 200.

3. T. Rep. 15.

that tenants in common cannot join in making a lease for their estates are several and distinct, and there is no privity between them; for which reason, one tenant in common may enfeoff another.—Judgment for the defendants.

THE reason of the difference therefore seems to be, that tenants in common have several titles: the freehold therefore is several, and if they be disseised, they are put to their several actions; and as the lands of tenants in common are to be considered as different estates, depending upon different titles, the plaintiff cannot recover on their joint

joint lease; because that were to allow the plaintiff to try two several and different titles in one issue, at the same time. Besides, the plaintiff, to make out his title, must prove that each demised *the whole* to him, or else he doth not sustain his declaration: and the discovery of the tenancy in common, proves the contrary; for as they have different titles to a moiety only, they could not each of them demise the whole. But joint-tenants are seised *per my et per tout*, derive by one and the same title, and therefore each may be said to demise the whole: and as they must join in an action for any violation of their possession, so their lessee shall recover on their joint demise. And if there be two joint-tenants, and each makes a several lease of the whole, the several moieties only pass by each lease. Coparceners seem to stand on the same foundation and reason; because both coming in as one heir, the possession must be joint, as that of joint-tenants. Yet in the old case of *Milliner v. Robinson*, it was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demised*. Heretofore therefore, to avoid difficulty in such cases, the way was for coparceners, joint-tenants, and tenants in common, to join in a lease to a third person, and for that lessee to make a lease, after the ancient course, to try the title.

See 2. Black.
1077.
5. Burr. 1604.

1. Will. 1.
Ante, 312.

Moor 632.

AND formerly a lease made by a guardian to try the title of an infant, was held good; for though such lease might be voidable as to the infant, yet a stranger could not defeat it: and if the lessee had not been allowed to maintain his ejectment on such a lease, the infancy would deprive the minor of that remedy of punishing the trespasser, which persons of full age are intitled to; and which would have been denying to a minor the common right and privilege of others. The objection was to turn his own privilege of infancy against himself.

Hardr. 330.
Owen 18. 64.
Moor 105.
2. Leon. 216.
Bend. 195.
Dy. 337. 2.
1. And. 40.

It

3. Burr. 1806. It has been long settled, that even an infant may make a lease without rent, to try his title. Very prejudicial leases may be made, though a nominal rent be reserved, and there may be most beneficial considerations for a lease, though no rent be reserved. In no case can the lessee avoid a lease, on account of the infancy of the lessor, which shews it not to be void, but voidable only. And it is better for infants that they should have an election. The privileges which the law, for wise purposes, indulges to an infant—what acts shall *bind* him, and how far they are void or voidable only, and the sound principles upon which they depend—were elaborately discussed in the case of *Abbot v. Parsons*. But a lease for years, made by the testamentary guardian of an infant, should seem, from the case of *Parry v. Hodgson*, to be void. In that case the question was, whether a lease for twenty-one years, made by the testamentary guardians of an infant, Mr. *Spencer*, to *Parry*, was absolutely void, or only voidable. It appeared, that Mr. *Spencer* himself had done no one act, after he came of age, either towards establishing the lease (supposing it voidable), or to avoid it. On the first argument the court agreed in one point, *viz.* that a testamentary guardian by statute, till an infant was twenty-one years of age, and a guardian in socage, till an infant was fourteen, were the same; therefore whatever interest the latter had in lands till the infant was fourteen, the guardian by statute had, until he be twenty-one. But as to the main question, whether the lease was void or only voidable, they all (except NOEL, J.) doubted much, and gave no opinion. The Chief Justice inclined to think the lease void. CLIVE, J. said, he was far from saying it was either void or voidable. BATHURST, J. gave no opinion, but seemed to think, that whether the lease was void or not at first, it certainly became void, or at an end, when

1. P. Wms.
203, 4.

Mr.

Mr. Spencer came of age, so could not be a subsisting lease to give the lessor of plaintiff title. NORL, J. was of opinion, that the lease was a good lease, and only avoidable by the infant when of age: that he might then affirm it if he thought fit; but said, he should be ready to depart from his opinion, if he should find he had come into it too readily. *Alterius consilium*. Afterwards, the court were all clearly of opinion that the guardian of an infant cannot make a lease of lands, and that the lease in this case was absolutely void.—Judgment for defendant.

2. Will. 135.

BUT if the lessor of the plaintiff claim title as guardian of the infant, he may be called upon to prove that the infant is not fourteen years of age.

1. Black. Com.

461.

5. T. Rep. 471.

A MAN might bring an ejectment on a joint lease made by baron and feme, of the lands of the wife, if the lease were made by herself in person, whether by parol or indenture; for the contracts of the wife, relating to her own estate, are but voidable during coverture, that she may have the benefit of them after the death of her husband, and, if it shall be for her interest to confirm them: but the husband, it is said, ought to join in such lease, for the husband and wife are considered in law as one person; and if the former has an interest during coverture, in the property of the latter, the whole proprietor would not join in the lease, without the husband: and as on such joint-lease, it may be said to demise the whole, that therefore the lessee might, according to the ancient practice, maintain an ejectment on such demise. But it was not necessary that the husband and wife should join in a lease, to try title to her estate: he alone might make a lease for that purpose; because, during coverture, he hath power over her property: all his contracts therefore relating

1. Cro. 61.

Cro. El. 438.

461.

Cro. Jac. 334.

See Cowp.

201.

Doug. 53.

8vo.

Cro. Jac. 617.

Cro. Jac. 322.

relating to it are good during his life; for his pleasure must determine for her who hath resigned her will to him, though after his death she might avoid the lease.

Yelv. 1.
2. Brownl.
248.

¶ YET where the plaintiff declared on a joint lease by baron and feme, and the lease appeared in evidence to have been executed by a third person, by virtue of a letter of attorney from the husband and wife, such evidence was not allowed to maintain the declaration; because she cannot delegate a third person to act for her, having already devolved all power and authority on her husband. But though the letter of attorney was held void as to the wife, yet it was deemed good as to the husband: hence

Cro Jac. 617. was held, that the lessee might, in this case, declare as to the lease of the husband only.

Cro. Eliz. 469.
535.
Owen 18.
Latch 199.
Hardr. 330.
Lutw. 803.
Co. Lit. 398. a.
4 Co. 26. a.

A COPYHOLDER may declare on a lease for any number of years without forfeiture; and the lessee of a copyholder, for a year, may sustain an ejectment: for his estate is warranted by law, and it is the most speedy way for him to recover the possession.

SECONDLY, Of amending the declaration.

Carth. 3.
Comb. 15. 50.

IF the cause be adjourned for difficulty into the exchequer-chamber, since the court itself delays the plaintiff it will, upon a rule delivered to the defendant to shew cause to the contrary, enlarge the term; unless the defendant can shew very good cause to the contrary; because the defendant, having entered into a rule to confess a lease without mentioning the term, it must be understood to be such a lease as is adapted for the trial of the plaintiff's title; especially since the defendant, by coming into the room of the casual ejector, had delayed the plaintiff from getting possession: for though it may be said to be the plain

plaintiff's fault for not delivering his declaration of a term large enough, whereon to obtain judgment; yet since the defendant delays him by permission of the court, it is not fit that the original shortness of the term should turn to his prejudice.

BUT this case is said in *Salkeld* to have been done by consent of parties, that is, that the court would not take further time to adjourn and deliberate, where the term was near spent, unless the parties would consent to enlarge it. For where the parties were hung up by an injunction from the court of chancery, the court refused to enlarge the term, without consent of parties; because that would be to alter the record of the plaintiff's declaration, which they would not do without consent. *Salk. 257. Comb. 276. 6. Mod. 110.*

HOWEVER in a subsequent case, the term was enlarged without consent, from five to ten years. And the court has changed the plaintiff in ejectment, after declaration delivered; enlarged the term, where the cause has been long in agitation; and judgment has been entered against the plaintiff even after his death. *Str. 1172. 1. Sid. 14. 5. Mod. 11. 1. Mod. 252.*

So, in the case of a plain mistake, the court will enlarge the term; as in *Lee v. Ellis*, which was an ejectment of Hilary Term 1772. The plaintiff declared on a demise, *November, 27. Geo. 2. 1753*, to hold from 30th *October* then last past, for seven years. On this record notice was given for trial at the Lent assizes 1772, and a special jury struck; but the mistake being discovered, the record was not entered. It was moved to amend the declaration, by striking out the word "seven," and inserting the word "thirty-one." *Per Cur.*—This is a plain mistake in the declaration, and may be amended by the writ, which speaks of a term not yet expired; whereas the declaration

counts of a term expired twelve years before the action brought. An ejectment is the creature of the court, and open to every equitable regulation for expediting the true justice of the case.

Barnes, 4to
edit. 186.

See *Cole v. Baker*, ante 209,
and *Smallwood v. Strober*,
ante, 211.

At present, the general rule of amending declarations in ejectment seems to be, that no such declaration can be amended before appearance; nor afterwards, except in matter of form. And in the following case the demise was held to be mere matter of form.

4 Burr. 2447.

Hardman v. Pilkington and Russell. A rule had been made for defendants to shew cause, "why the declaration should not be amended," by altering the time of the demise. The case was so circumstanced, that the plaintiff would have been barred by a fine, if put to bring a new ejectment. The declaration had been delivered four years, when the defendant pleaded; but nothing had been done since; the plaintiff having been stayed by an injunction which had been but just dissolved. The ejectment was brought upon an entry made to avoid a fine; and the plaintiff was out of time to make a new entry. On shewing cause against the rule, *Bennet v. Gandy* was cited; where leave was prayed to amend the declaration, by altering the time of the demise, but refused; because, if the time was altered, that would make it a new demise. Also, *Caseworth v. Thomas*, which was a like determination. So, in *Scrutton v. Scrutton*, it was denied; and in *Roe v. Doe*, on the demise of *Stephenson*. So, in *Puleston v. Warburton*; and *Goodtitle v. Meymott*.

Carth. 178.

P. 11. G. 2.
B. R.

Barnes, 4to,

17.

Id. 186.

Carth. 401.

5. Mod. 332.

2. Str. 1211.

2. Burr. 665.

On the other side, the case of *Astin v. Parkins* was relied on, where all the judges unanimously held, "that an ejectment was to be considered as a fictitious form of action, invented under controul of the court for advancement

“vancement of justice, and a mode to try the right in question.” And it was said, that Mr. Justice YATES, at Lancaster, had ordered a declaration in ejectment to be amended: YATES, J. and ASTON, J. thought the plaintiff, being out of time to make a new entry, was a reason for amending; and cited the case of the *Executors of the Duke of Marlborough v. Widmore*; where the declaration was amended by laying the promise, as made to the executors, instead of the testator; because the action would otherwise have been lost, by the statute of Limitations having run upon the promise made to the testator.—LORD MANSFIELD. An ejectment is a mere fictitious action. The demise is mere matter of form: it does not exist. It is not like a real title. It appears, that this was an entry to avoid a fine; and the demise is laid before the plaintiff had made the entry, instead of being made after. We are all clearly of opinion, that he ought to be at liberty to amend, upon payment of costs.

2. Stra. 890.
Fitz. 193.

In a subsequent case (*Vicars v. Haydon*, lessee of *Carrol*), Cowp. 841, the court of king's bench, after affirming a judgment in ejectment, from Ireland, amended the declaration, by enlarging the term, and that though the record had previously been remitted. *Carrol*, in Michaelmas Term 1762, in the name of *Haydon*, his lessee, brought an ejectment in Ireland for lands there, and laid the demise to be for fifteen years, from 25th of November 1762. In the same Term, an injunction was granted by the court of exchequer in Ireland, at the instance of *Vicars*. On application to the court, *Carrol* was permitted, at the summer assizes in 1768, to try the ejectment, execution being stayed till further order; and the plaintiff had a verdict. A new trial was moved for, and refused: whereupon *Vicars* brought a writ of error in the court of king's bench here,

and the judgment below was affirmed. *Carrol*, proceeding to get possession of the premises, notwithstanding execution had been stayed by order of the court of exchequer in Ireland, was, in 1769, prevented from so doing, by further injunction; and dying in 1770, the injunction bill was revived against his representatives. In Michaelmas Term 1777, the cause in the court of exchequer in Ireland was heard, and *Vicars'* bill dismissed: but thirteen days before dismissal of the bill, the term in ejectment expired. In Easter Term 1778, which was after the writ of error brought, and before the record was remitted, application was made to the court of king's bench in Ireland, to amend the record by enlarging the term; which was refused, because the record of the judgment was here; and the court there said, "they never amended after a writ of error was brought, and the record sent over to England: but the application to amend must be made here." The record was afterwards remitted to Ireland. It was then moved in court *here*, to amend the record, by enlarging the term in the declaration from fifteen to twenty years. On shewing cause, it was objected, that as the record was sent back to Ireland, this court could not amend. Pending an ejectment, the court might enlarge the term; but here, the cause was determined: therefore it could not be done but by consent. A distinction was also taken between a motion to enlarge a term before it expired, and after; which was the case here: for that was more properly making a new term. In support of the rule was cited the last case of *Pilkington v. Russell*; *Oates v. Shepherd*; and *Roe v. Ellis*, East. 14. G. 3. C. B. where the declaration counted of a term expired twelve years before the action brought, and was amended.

1. Salk. 267.

2. Stra. 1272.

LORD

LORD MANSFIELD. You have not touched upon the only doubt I have, which is, whether, being a record from Ireland, this court can amend it: for though the record be fictitiously here, it is not so in fact.

To this it was answered, that in *Bac. Ab. tit. Error*, 203. it is said, "that when the transcript is come safe from Ireland, and entered on the rolls of this court, it is a perfect record here." That in *Yelv.* 118. a precedent was shewn of a record removed from Ireland remaining here. And *Meredith's case*, where a judgment *1. Vent. 217* given in Ireland was amended by this court, was cited.

LORD MANSFIELD. The single doubt is upon the form. For the record is gone back to the court of king's bench in Ireland, and the whole of it is supposed to be sent there. Therefore they must issue the subsequent process. Upon a writ of error to the house of lords from this court, a transcript only goes up: and the record is supposed to be sent back again hither; and if the judgment be affirmed, this court must issue execution. On a writ of error from the common pleas, though a transcript only be removed, this court may award execution. Upon a writ of error from Ireland, in judgment of law, the record is removed here; but in fact, a transcript only comes over; and when the judgment is affirmed, is sent back. In the case of the bill of exceptions in *Symmers v. Regem*, I had occasion to enquire *Cowp. 489.* particularly into the form, and it is as I have stated. When the judgment is affirmed, a mandatory writ issues from hence, to the king's bench in Ireland, reciting the whole record and proceedings, and commanding them to do execution, by which the cause is restored to that court. In the case of *Sir Thomas Broughton*, which went *See 1. Black.* from this court to the house of lords, after the house had 933.

affirmed the judgment, it was supposed a mistake had been committed by the house, and it was wished to be enquired into; but the record was come back to this court. If the court can do what is asked in this case, it ought to be done: it is mere matter of form.—The court has looked into the case; and the proper mode of relief is according to the following rule, which was pronounced; namely, “that upon payment of the costs of the application to the plaintiff in error, the defendant in error be at liberty to amend the record in this cause, by striking out the word “fifteen” in the declaration, and inserting, instead thereof, the word “twenty:” and that a *superfedeas* issue, at the expence of the defendant in error, to the writ of *mittimus* heretofore sent to the judges of the court of king’s bench in Ireland; and that another writ of *mittimus* issue, at the expence of the defendant in error, to the judges of the said court, inclosing the tenor of the record so amended.”

N. B. THE *superfedeas* was general, *quia improvide emanavit*, without assigning any reason. The courts here have not now any appellat jurisdiction over Ireland; see 22. G. 3. c. 53. and 23. G. 3. c. 28. Wherefore, see the last ed. of Hale’s Hist. of the Common Law, v. 2. p. 11.

3. Term Rep. 749. AND the *poslea* may be amended at any time, by the judge’s notes; even after final judgment, and a writ of error brought; as in *Church v. Perkins* and twenty-three other defendants. At the trial of that cause before LORD LOUGHBOROUGH, a verdict was given for the plaintiff against *twenty-two* of the defendants. The *poslea* stated, that (“as to all the premises in the within-written declaration mentioned, except as to two cottages parcel thereof,”) *twenty-two* of the defendants (naming them) were guilty, &c. and damages were assessed at one shilling,

ling, and costs; and ("as to the said two cottages parcel
 " of the premises in the said declaration mentioned,")
 that the said *N.* and *M.* (the other *two* defendants) were
not guilty, &c. The defendants brought a writ of error;
 after joinder in error, and a day appointed for argu-
 ment, the defendant in error applied to LORD LOUGH-
 BOROUGH, to amend the *poslea* by his notes, which he did,
 by directing that the words within the inverted commas
 (as above) should be struck out. The defendant in error
 afterwards applied to one of the judges of the court of
 king's bench, namely, Mr. J. BULLER, to amend the
 judgment roll and the transcript thereof, as above; who
 made a conditional order, that the lessors of the plaintiff
 should be at liberty to amend the roll, agreeable to the
poslea. A motion was afterwards made to set aside the
 order made by LORD LOUGHBOROUGH, because it was
 an amendment by a judge of another court, and made
 after the expiration of one Term after the trial. It was
 urged, that the instant the *poslea* is delivered into the
 court to which the record belongs, the judge of *nisi prius*
 has no longer any controul over it; and in any event
 could not be permitted to be made after a Term had
 elapsed. But the court said, there was no foundation for
 the objection; for that according to the practice of amend-
 ing by the judge's notes, which was of infinite utility to
 the suitors, and as ancient as the time of Charles the first,
 the amendment might be made at any time.

Dougl. 703.

CERTAINLY, where there is a general verdict on a de-
 claration, consisting of several counts, some of which are
 inconsistent, or bad in point of law, and evidence only has
 been given on those which are good or consistent, the ver-
 dict may be, and constantly is, amended by the notes of the
 judge who tried the cause. Nay, the practice has even been
 extended to a *criminal* case. For instance, one *Gibson* was tried
 for

Doug. 377.
8vo.

for robbing Mr. *Francis*, and convicted; a mistake was afterwards discovered in the verdict, which, upon consultation with all the judges, was corrected from minutes signed by the jury, and the prisoner executed. This distinction however must be attended to, that if there be only evidence at the trial upon such of the counts as are good and consistent, a general verdict may be altered by the notes of the judge, and entered only on those counts; but if there be any evidence applicable to the other bad or inconsistent counts (as in an action for words, where some actionable words are laid, and some not actionable, and evidence be given of both, and a general verdict), the *postea* cannot be amended: in such case, it is impossible the judge can say on which of the counts the jury assessed the damages, or how they apportioned them: the only remedy then is by awarding a *venire de novo*.

1. Lev. 134.
2. Stra. 513.
315.
3. Stra. 1197
1. H. Black.
227. 232.
Barnes, 4to,
478.
Doug. 8vo,
376. 722.

VII. *The plea and general issue.*

THE general rule in the issue of this action is, that whatever bars the right of entry, is a bar to the plaintiff's title: the plaintiff must therefore prove seisin, within twenty years, in himself or his ancestors; or must prove seisin, in a third person, of a particular estate in the land, and that he claimed within twenty years after the reversion accrued; or that he was an infant, feme covert, *non compos*, imprisoned, or beyond the sea, at the time when the title accrued, and that he claimed within twenty

1. Burr. 119.

years after he came of age, &c.—for every plaintiff in ejectment must shew a right of *possession*, as well as of property; and therefore the defendant need not plead the statute of Limitations, as in other actions.

A FINE

A FINE and non-claim, or a *discent cass*, which take away the entry, are good pleas in this action, in bar of the plaintiff's right of entry.

So an accord with satisfaction is a good plea; for it is an action of trespass in its nature. And by permission of the court, the defendant may plead to its jurisdiction. For instance,—

ANCIENT demesne is a good plea in ejectment; though leave must be obtained from the court to plead it: and the affidavit, to obtain such leave, must shew that the lands are holden of a manor which is itself ancient demesne. As in *Rust v. Roe*, cause was shewn why the tenants in possession should not have leave to plead that the lands specified in the declaration were holden in ancient demesne. It was admitted, that such a plea might be received in ejectment, with leave of the court and on a proper affidavit; but the affidavit was objected to, because it only alledged "that the lands in question were holden in ancient demesne, and of the manor of Godmanchester;" but did not alledge "that the manor was (itself) holden in ancient demesne." That in the case of *Denn v. Fenn*, the affidavit was, "that the lands were holden of such a manor, which manor was holden in ancient demesne." Besides, it might be only a term, in the lessor of the plaintiff: if so, he could not sue there; for the writ of right close only lies, where the demandant has a fee, or at least a freehold. In support of the rule was cited *Ferrers v. Miller*, where ancient demesne was pleaded in ejectment. It was conceded, that leave must be asked of the court to plead it: and though by 4. & 5. Ann. c. 16. s. 11. it is required, in case of pleading a dilatory plea, "that the party offering it, do by affidavit prove the truth of it, or shew some probable cause to the

9. Co. 77. 2.

5. Co. 105.

1. Ld. Raym.

1418. cont.

3. Wils. 57.

1. Burr. 1046.

Alden's case,

5. Co. 105.

Trin. 24. G. 2.

B. R.

1. Salk. 217.

Carth. 220.

1. Show. 386.

“the court to induce them to believe that the fact of it is true;” yet the affidavit did shew probable cause to induce such belief. It shewed, “that the lands were holden in ancient demesne; that they were holden of the manor of Godmanchester; and that there was a court of ancient demesne in the borough of Godmanchester, where the plaintiff might have proceeded.” Whether the lands were parcel of the superior manor, was a fact triable by jury: though the question, “whether that superior manor be or be not holden in ancient demesne,” must be tried by record, namely, by Domesday Book. The judges in court concurred in opinion, that there was not sufficient ground laid for obtaining leave to plead the plea.—FOSTER, J. observed, that as it was agreed to be necessary to ask leave of the court to plead this plea to a declaration in ejectment, it follows of course, that it must be in the discretion of the court, either to grant or to refuse leave. And he thought, the affidavit was not sufficient to oust the superior court of its jurisdiction. He spoke of the courts of ancient demesne, as putting the subject out of the protection of the law, and fitter to be totally destroyed, than favoured or assisted.—WILMOT, J. said, it was a strange, wild jurisdiction; where the jurors are judges both of law and of fact; where the ignorant are called upon to determine the nicest points of law; therefore he was not for granting such leave, unless compelled by authority. Indeed if the case had been brought strictly within the rule, leave must be granted: we cannot help it. The authorities, down from *Aiden's* case to this time, it is true, are, “that ancient demesne is a good plea in ejectment.” But if you would oust this court of jurisdiction, you must shew “that another court has jurisdiction.” Now this affidavit does not shew “that there are suitors in the other court;” nor “that these lands are holden of a

“manor,

"manor, which manor is holden in ancient demesne." Whereas, if the lands only, and not the manor, are ancient demesne, the matter cannot be tried in the court of that manor. The affidavit ought to have shewn, "that the lands are holden of a manor, which manor is ancient demesne:" and so was the affidavit in the case of *Denn v. Fenn*; and so is the plea. It cannot be tried, whether the lands themselves are ancient demesne. *Domesday* will not shew that. *Domesday* will only shew whether the manor is so or not. The form of the plea makes this as clear as the sun. This affidavit does not therefore pursue the proper form. And it ought to be shewn, that the lessor of the plaintiff has a freehold. How can he sue there, in ejectment, as lessor of a term? Upon such a strange, wild jurisdiction as this, and upon such an affidavit, I am not for giving the defendant leave to plead this plea.—Rule discharged.

AND where an ejectment was delivered in the county borough of Carmarthen, it was moved for leave to plead to the jurisdiction of the court of king's bench; a rule to shew cause was granted: which was afterwards made absolute. Yet the rule granted in this instance, seems only to have affected the casual ejector, the only then defendant. The motion might have been more applicable, had it been made, "that the tenant in possession, when made defendant, might have leave, &c." The common practice of the court being to receive motions for judgment against the casual ejector *nisi, &c.* after the Term is ended, upon the common rule, the new defendant has not any opportunity, either to plead to the jurisdiction, or to move for leave so to do. But in every such plea the defendant must state another jurisdiction; therefore if an action be brought here, for a matter arising in Wales, to bar the remedy sought here, the jurisdiction of

the court in Wales must be shewn; and in every case, to repel jurisdiction here, the party must shew a more proper and sufficient jurisdiction elsewhere. Pleas either in bar, or in abatement of the action, are now but seldom (if ever) pleaded; for, according to the modern practice, the defendant, if he appear, is generally bound by the consent rule, to plead the general issue of not guilty. But as this rule was introduced to answer the purposes of justice, it is sometimes departed from, for similar purposes. As where an ejectment was intended to try the right to a rectory, the defendant was admitted to plead that he himself was rector, and to traverse the rectorship of the plaintiff's lessor, in order by that mean to bring the right in question. For the most part however, the defendant can only plead the general issue; which is therefore usually left with the consent rule, at the judge's chamber or the prothonotary's office: but if it be not so left, the plaintiff must give a rule to plead; and then, judgment may be entered for want of a plea, as in other actions, without a special motion in court for the purpose.

Carth. 180.

Reg. Hil.
1649. and
Trib. 18. C. 2.
B. R.

Sy. Rep. 367. An attorney of the court was, with another, made nominal plaintiff in ejectment: and the court would not grant an imparlance to the defendant, because the attorney claimed his privilege to be answered the same Term, on account of his being always resident in court. This mode of hastening the cause is now disused, since the delivery of a declaration to the casual ejector before the Term, forces the defendant to issue the same Term, which is equally expeditious.

Ld. Raym.
1414.

In making up the issue, the first declaration must not be varied from, except in the defendant's name.

VIII. *The verdict, and new trial.*

NEXT follows the verdict. If however the plaintiff, after issue and before trial, enter into part, the defendant may, at the assizes, plead that circumstance as a plea *puis darrein continuance*, in bar to the plaintiff's action; a plea which heretofore the judge might, in his discretion, either receive or not. If received, it stops the trial; the plaintiff cannot reply to it at the assizes; and the judge must return it as part of the record of *nisi prius*. But in *Paris v. Salkeld*, the court held that they had no discretion either to reject or to receive a plea *puis darrein continuance*,^{2. Willf. 137. 139.} but, if verified by affidavit, were bound to receive it. It is, in truth, a *matter of right*, not of favour, in the party tendering it: and the opinion of WILMOT, Ch. J. is conveyed in language peculiarly forcible. The court of king's bench has since, in the case of *Lovell v. Eastaff*,^{3. T. Rep. 554.} confirmed that opinion.

If the property litigated be of great value^(a), may probably be attended with great length of enquiry, and difficulties are likely to arise in the course of the trial, either party may apply to the court for a trial *at bar*; the words of the statute of *Westminster 2.* (13. Ed. 1. c. 30. which authorize the application) being, *sed inquisitiones de grossis et pluribus articulis, quæ magnâ indigent examinatione, capiuntur coram justiciariis banci*. Lord HOLT has been stated to have said, that a trial *at bar* is of common right. The general received opinion however is, that as all questions concerning trials *at bar* must necessarily depend upon their

Hal. Hist. C.L.
2 v. 138. ed.
1794.

Doug. 437.
Black. Com.
3 v. 352.
1. T. Rep 363.

(a) The rule, it has been said, is not to allow a trial *at bar*, except where the yearly value of the land is one hundred pounds. 1. Barn. K. B. 141. but see 1. Stra. 479.

own particular circumstances, therefore, whether it shall take place or not, must depend upon the discretion of the court; a discretion which, as it ever has been, so no doubt ever will continue to be, regulated by law, and founded upon precedent. If the crown be immediately concerned, the attorney-general has a right to demand a trial at bar: and it is said to be good cause for it, if a judge, or even a master in chancery, be concerned; and was never denied to an officer of the court, nor hardly to any gentleman at the bar. Be that as it may, by the uniform practice of the courts, a trial at bar is not permitted to take place in either of the issuable Terms, (*Hilary* or *Trinity*); nor the same Term in which the motion is made. Under circumstances, the motion has been made and granted, in ejectment, even before appearance; though regularly it ought not to be made till issue be joined between the parties. Value alone, or the probable length of inquiry, is not a sufficient ground for the application; it must be a *weighty matter*; difficulty, in short, should concur; the application therefore must be supported by an affidavit stating "the value *per annum* of the estate; that many witnesses are to be produced on each side; that the title of lessor of the plaintiff will depend (as the case may be), either on an intricate course of descent, or the legal operation of deeds; that various points of law and other questions will necessarily arise at the trial; and that the cause therefore should be tried at the bar of the court, by a special jury of the county where the estates lie, if the court shall so think fit, and not before any one judge of assize." And by some authorities it is laid down, that it is not sufficient to swear generally that the cause is expected to be difficult; but the *particular* difficulty which is expected to arise, ought to be pointed out, that the court may judge whether it be sufficient: for the granting of it is not only very expensive to the parties,

Stra. 52. 644.
816.

1. Sid. 407.

2. Salk. 651.

6. Mod. 123.

2. Lil. P. 608.

1. H. Black.
211.

Barnes, 455.
Stra. 696.

2. Salk. 648.

Say. 79.
2. Lil. P. R.
604.
1. Barnard.
K. B. 141.

ties, but the business of the other suitors is thereby delayed. If the court grant the motion, the cause must be tried by a special jury, (struck in the usual manner), at the bar of the court in which the action is commenced. The trial being appointed, the attorney for the plaintiff must (if the action be in the court of *common pleas*), before the *effoin-day* of the Term in which the cause is appointed to be tried, give notice thereof to the chief prothonotary, or secondary; that the same (like a demurrer or other special case) may be inserted in the court-book, kept for that purpose. A day is then fixed for trial; and the Judges are to have copies of the issues delivered to them, four days before the time appointed for trial. Indeed the granting of a trial at bar, seems not only to be a matter altogether in discretion of the court, but is considered as a *favour* conferred on the applicant; insomuch that the court has, apparently upon that ground, imposed terms upon him, even as to the eventual costs, and that in the very first instance. As in *Brown v. Brown*. There an application was made for a trial at bar. On shewing cause against the rule, it was stated, that the lessor of the plaintiff was unable to bear the expence, and that one of his witnesses was above eighty years of age, who might die before a trial at bar could be had. The court made the rule absolute; but said, that as it was a favour asked by the defendant, they would lay him under the terms, that if he succeeded, he should only have *nisi prius* costs; but that if the lessor of the plaintiff were to succeed, he should have bar costs; and that the old witness should be examined upon interrogatories, and her deposition read, if she should die before the trial. It was also (by consent) made part of the rule, that the cause should be tried by a *Middlesex* jury, instead of one from *Norfolk*, where the premises were situated.

R. Hil. 9. Ann.

Mich. 3. Geo.

2.

Doug. 62.

437.

Salk. 648.

Salk. 259.

Sty. Pr. Reg.

442.

1. Keb. 249.

If the defendant does not appear at the trial, and confess lease, entry, and ouster, according to the rule, the practice is to call the defendant, and also his attorney (if the attorney be within the rule), and on non-appearance, or refusal to comply with the rule, to call the plaintiff and nonsuit him; then, at the plaintiff's instance, the cause of nonsuit is indorsed on the *possea*, which intitles the plaintiff to judgment against the casual ejector, when the *possea* is returned into court. There is however, a considerable difference between the practice of the king's bench and common pleas, in case the plaintiff be nonsuited, owing to the defendant not appearing at the trial, and complying with the terms of the common rule. By the practice of the *latter* court, immediately after trial, if the plaintiff be nonsuited for the cause alluded to, he may enter up judgment against the casual ejector, and take out execution: a practice apparently founded in good sense and justice, recognized in the case of *Fairfax v.*

Hil. 17. Geo. 3. *Bentley*, on mature consideration; with a view, no doubt, to advance the remedy for the ease and benefit of the suitor, and ever since uniformly adopted. Indeed by the language of the consent-rule, in *that* court, in case the plaintiff be nonsuited, by reason of any default, (in disobedience of the rule), judgment may be entered against the casual ejector; and the person admitted defendant "shall take no advantage thereof, but pay to the plaintiff his costs." The case of *Fairfax v. Bentley* was a motion to shew cause why judgment against the casual ejector, and the writ of possession, should not be set aside; the former having been signed, because the defendant had not confessed lease, entry, and ouster, at the trial, in consequence of which the plaintiff had been nonsuited: and the question was, whether judgment could be signed, and writ of possession issued, *before* the day in bank. On shewing cause against the motion, the

terms

terms of the consent-rule, namely, that "in default of confessing, &c. judgment might be entered," were relied on, and *Sty. Pr. Reg.* 442, 443, cited. The court took time to consider the question. It appearing that the usual practice had been to sign judgment, and take out the writ of possession, immediately after the trial, they held the proceedings regular, and discharged the rule. The Chief Justice observed that there was less possible inconvenience in this practice, than otherwise: he also observed on the difference between the *consent* and *condition* rule: the latter expressly stays execution; but by the other it is expressly consented, that judgment may be entered in default of confessing lease, entry, and ouster. By the practice of the court of *king's bench*, after such a nonsuit (though arising from the neglect and disobedience of defendant himself), the plaintiff must wait until the *postea* be regularly returned into court, on the day in bank, before he can enter up judgment, or obtain execution. In that court, in the case of *Lord Palmerston v. Copeland*, a rule was obtained to shew cause why the writ of possession, which had been issued, should not be set aside for irregularity, and possession restored. The defendant not having confessed lease, &c. at the trial, the plaintiff was nonsuited, and immediately entered up judgment against the casual ejector, and took out the writ of possession, before the *postea* came in, on the day in bank. For the plaintiff the regularity of the proceeding was, of course, contended for; and the practice of the common pleas, the case of *Fairfax v. Bentley*, and *Sty. Pr. Reg.* iii. *Contempt*, cited in support of it. The court, on reference to the master, were satisfied of the irregularity, and stated the practice from *Lil. Pr. Reg.* 2. vol. 423. ed. 1735, to be, that in such a case, the writ could not be taken out till after the *postea* comes in, on the day in bank. And Lord KENYON added, that if the practice in C. B. was

otherwise settled, it would not alter the mode of proceeding in *this* court; and he thought the latter method beyond all comparison the best.—Which of the two modes of practice be best, does not become me to enquire; I may however, be permitted to lament, in common with the profession, that two of the superior courts in the kingdom should differ so materially on a point (which, though of practice, is nevertheless) necessary to the regular administration of justice.

Ld. Raym.

729.

Barnes 4to

edit. 149. 174.

BUT where there are several defendants for the same premises, and some appear and confess lease, entry, and ouster, but others are disobedient to the rule and refuse to appear, the practice is to proceed against those who do appear, and to enter a verdict against the rest; but then the cause of that verdict is indorsed on the *poslea*, which, as to them, intitles the plaintiff to judgment against the casual ejector.

1. Ventr. 335.

It was formerly holden, that if some of the defendants did not appear, the plaintiff could not proceed against those who did, but in such case must have been nonsuited as to all; because all the defendants not admitting the demise, and the plaintiff not proving an actual entry and demise, he could not maintain his declaration; but if there appeared to be any covin between the person not appearing and the lessor of the plaintiff, the court would stop the judgment against the casual ejector, for the part of him who did appear; because a declaration was delivered to each of the defendants for his respective part: therefore where one of them did not pay obedience to the rule, the plaintiff had judgment against the casual ejector for his part only. This practice was soon discontinued. Another succeeded, by which the plaintiff was permitted to proceed against those who did appear: but then,

2. Ventr. 195.

then, if nonsuited on the trial, all the defendants were intitled to costs, which any one of them might release to the plaintiff. This latter practice, though more reasonable than the former, was pregnant with the mischief (before alluded to) of making a person defendant, with others, who was not concerned in the possession, in order to save the costs; it was therefore justly abolished, and the modern practice introduced, in the reign of William the third.

Ld. Raym.
729.
8. & 9. W. 3.
c. 11. s. 1.
Ante, 167.

THE plaintiff declared of one hundred acres of land, and in evidence shewed a lease of forty acres only. It was objected that the lease did not support the count; but it was ruled that the ejectment was well brought for so much as was comprised in the lease, and that as to the residue the jury might find the defendant not guilty.

Cro. El. 13.

So where the declaration was of the fourth part of a fifth part (in five parts to be divided), and the title of the plaintiff, upon evidence, was only to the third part of a fourth part of a fifth part (in five parts to be divided); which was only a third part of that which was demanded in the declaration; the court determined that the verdict might be taken according to the title.

1. Sid. 339.

AND in a modern case, where the declaration was for a moiety, and the verdict for a third part, the plaintiff had judgment according to the verdict, for if more is laid, there is no reason why he should not recover less: though the reverse will not hold; namely, that if he demand less, he shall be intitled to recover more.

1. Burr. 330.

So, in the case of a tenancy from year to year, the tenant may declare on a term for seven, or any other

number of years ; for the real interest of the plaintiff cannot in any manner be affected by the length of time stated in the declaration ; the whole of which being now considered (except, perhaps, as to the time of the demise) as an absolute fiction.

Shore v. Porter,
ante, 94-
3. T. Rep. 13.

Yelv. 114.

FORMERLY indeed, it was holden, that if an ejectment had been brought for an acre of land, and the metes and bounds described in the declaration, and the jury had found the defendant guilty in half an acre of the land, the verdict would be bad ; because of the uncertainty of which part or moiety the plaintiff was to have execution. But had it been in an action of trespass, the verdict would have been good ; because, as damages only are recoverable in that action, a trespass proved in any part of the acre would have been sufficient,

Yelv. 166.
J. Brownl.
145.
Owen 133.

So where the plaintiff declared on the lease of a house, ten acres of land, twenty acres of meadow, and twenty acres of pasture, by the name of "an house and ten acres of meadow, be the same more or less," and had a verdict, the judgment was arrested ; for the declaration was deemed so repugnant and uncertain, that even the verdict could not help it ; because the land mentioned in the declaration was of a different nature from that mentioned in the *per nomen* : besides, the number of acres was so different, that the words *more or less* could not reduce it to any certainty ; for it were unreasonable to extend them to twenty acres more than were mentioned in the *per nomen*.

J. Burr. 119.

IN case a special verdict be found, it ought to appear that the lessor of the plaintiff might enter, at the time when he brought the ejectment. Indeed as to a special verdict, nothing, it is said, is more settled than that the court cannot

cannot intend any thing but what is found by the jury; Hob. 262.
 otherwise, the rule of law would be inverted; for *ad ques-* 1. Will. 55.
tionem facti non respondent iudices—ad questionem juris non 1. Inst. 255.
respondent juratores. And the jury must find facts, and not b.
 evidence of facts: and where the special verdict concludes 1. Will. 56.
 generally, the whole case must appear upon record. 2. T. Rep. 666.
 General as the rule is, that upon a *special* verdict, nothing
 can be *presumed*, yet in construing a verdict, as the great 3. Burr. 1776.
 object of the law is, whether it be decisive between the 2. Burr. 699.
 parties or not, so to give that effect, another principle is Doug. 623.
 interposed, namely, that verdicts shall be favourably con- 731. oct.
 strued; and that “if a verdict can be concluded out of Hob. 254.
 “the finding, to the point in issue, the court shall work
 “and mould it into form, according to the real justice
 “of the case, and make it serve.” For verdicts are not
 to be taken strictly, like pleadings; on the contrary, the
 court will collect the meaning of the jury, if they give such a
 verdict that it can understand them. The court, therefore,
 will not award a *venire facias de novo*, where the verdict is
 only faulty in form, if it be plain and evident what the jury 1. Burr. 709.
 meant. In such case, most undoubtedly, judgment may
 be given on the *substantial* finding, though the officer may
 have been irregular and faulty in point of form. The
 nature of a *venire facias de novo*—in what cases it ought to
 be granted—and the difference between that and the motion
 for a new trial, were clearly pointed out by Chief Justice
 WILLES, in delivering the opinion of Lord HARDWICKE 1. Will. 48,
 and the Judges, on the case of *Witham v. the Earl of Derby*. 55.
 “The counsel at the bar endeavoured to confound a
 “*ve. fa. de novo* and a motion for a new trial; but they
 “are very different things: they agree indeed, in some
 “things, but differ in many. They agree in this, that a
 “*ve. fa. de novo* must be awarded in both, and that the
 “court may or may not grant either: but they differ,
 “first, in this, that a *ve. fa. de novo* is the ancient pro-
 “ceeding

“ceeding of the common law, but a new trial is only a
 “new invention. The first is as ancient as the law,
 “when attaints were in use, but motions for new trials
 “were introduced in this manner. The judgment in
 “attaint being very severe, and the punishment excessive
 “hard, to avoid that severity it was thought better to
 “proceed in a milder way, and so motions for new trials
 “were introduced. They likewise differ in this respect,
 “that new trials are generally granted where a general
 “verdict is found, a *ve. fa. de novo* on a special verdict;
 “but the most material difference between them is, that
 “a *ve. fa. de novo* must be granted upon matter appear-
 “ing upon the record, but a new trial may be granted
 “upon things out of it. If the record be ever so right,
 “and the verdict appear contrary to the evidence given
 “at the trial, or that the Judge has given wrong direc-
 “tions, a new trial will be granted; but it is otherwise
 “as to a *ve. fa. de novo*, which can only be granted in
 “one or other of these two cases: as first, if it appear
 “upon the face of the verdict, that it is so imperfect that
 “no judgment can be given upon it: secondly, where it
 “appears that the jury ought to have found other facts
 “differently; and it cannot be granted in any other
 2. T. Rep. 125. “case.” So if there be a bill of exceptions to the re-
 jection of evidence in the court of great sessions in *Wales*,
 and upon error, the evidence is deemed admissible, the
 court will award a *venire de novo* into the next English
 county. Indeed a *venire de novo* may be granted where
 the jury are improperly chosen, or there is any irregu-
 larity in their being returned. So, if they improperly
 conduct themselves. So, where the declaration consists
 of several counts, and the jury give general damages, and
 it afterwards appears that one of them is defective. So,
 where an imperfect verdict is found. 2. Ro. Abr. 721. pl.
 10. 722. pl. 16, 17, 18, 19. *Loveday's case*, 3. Co. 65. b.
 Bro.

6. Co. 14.
 Sty. 307.
 2. Stra. 887.

Bro. Abr. title *Venire Facias*, pl. 12. *Dort v. Eaton*, Sty. 64. *Ratcliff v. Dudeney*, Sty. 176. *Swan v. Fenham*, Sty. 410. *Horewood v. Holman*, 2. Bulstr. 32. *The King v. Sykes*, T. Raym. 202. *The King v. Hayes*, 2. Lord Raym. 1321. *Kynaston v. the Mayor of Shrewsbury*, 2. Str. 1051. *Hafwell v. Chalie*, 2. Str. 1124. *Wells v. Parker*, 1. T. Rep. 783. So on a demurrer to evidence, *Wright v. Pyn-* Sty. 335. 34.
der. And after a bill of exceptions not entered upon 2. Lev. 236.
 record, and a motion in arrest of judgment, the court inclined to grant a new trial. But no instance before that (in 2. T. Rep. 125.) in which a *venire de novo* has been granted after a bill of exceptions. And in *Fabrigar v. 2. Black. 929.*
Moslyn, the court refused to grant a new trial on the point of law contained in a bill of exceptions then depending. And a court of error (notwithstanding the case of *Street v. Hopkinson*) is competent to grant a *venire de novo*. It 2. Str. 1055.
 has been done by the house of lords, and is by no means Doug. 68.
 a novel practice. 731, 732.
 Cowp. 91.

In cases of importance it may be better, when any serious doubt is entertained respecting the law upon the subject, that the counsel on both sides should agree to take a special verdict; though in general, from the laudable motive of saving the heavy expence of drawing up and arguing a special verdict, the practice is to agree to a special case, to be argued and decided in the court in which the action was commenced; in the statement of which (as in a special verdict), care must be taken that the necessary facts proved, be stated, and *not* evidence 2. Will. 163.
 of facts;

AFTER a special verdict, the court will not permit the plaintiff to discontinue, in order to adduce fresh proof in contradiction of it. As in the case of *Gray v. Gray*, 2. Blac. 315.
 it was (after a special verdict) moved by the plaintiff, for leave to discontinue on payment of costs, or that the
 defen-

Salk. 178.

defendant might have judgment, as in case of a nonsuit. It was admitted, that this was never done upon general verdicts; but *Prince v. Parker* was cited, to shew that by favour of the court, it might be done on a special verdict, in order to set right any fact which had been misapprehended. For the defendant it was said, that the special verdict had found, that the testator had himself destroyed a will, subsequent to that on which the defendant's title depended; and that the plaintiff now wanted to prove, it was destroyed by the defendant. *Quod fuit concessum*. This therefore was an attempt to contradict the former verdict; and not to set it right. Of which opinion was the court, and discharged the rule.

Dormer v.
Fortescue,
Mich. 9.G.3.

HERE it may be proper to consider the nature of that evidence, I mean only as to some particular cases, which should be adduced to a jury at *nisi prius*, on the trial of an ejectment cause. To embrace the whole system of evidence necessary to sustain every legal title, would of itself require an elaborate treatise. Such of course cannot be the object of this Work, which, on the subject of evidence, must necessarily be confined to those points which commonly occur in the action; and that even in a mode as general as possible; and in a manner apparently loose and unconnected. First, it should be understood, that a co-defendant cannot be admitted as a witness, either for or against the plaintiff; if therefore, a *material* witness against the plaintiff be a *nominal* co-defendant, he should suffer judgment to pass against him by default, which will effectually restore his testimony. For if he plead, and by that mean admit himself to be tenant in possession, the court will not afterwards strike out his name, on motion; though in such case, if he consent that a verdict be given against him for the premises in his own possession, there can be no reason why he should not be a witness for another defendant.

So, to prove the fact of possession, the tenant is incompetent; for he cannot be permitted to support his own possession, by his own testimony. But where a witness produced to prove the lease, was objected to, because he had the inheritance in the land demised; it being answered that both parties claimed under the same person, he was admitted to give evidence; for, under circumstances between indifferent parties, and where he has not any interest in the question, the landlord is a competent witness to prove the terms of his own demise. So, in an action of covenant for rent upon a lease by *A.* to *B.* the point in issue being, whether *C.* (whose title both parties admitted) demised *first* to *A.* or to another person; *E.* was deemed a competent witness to prove the point in issue: which was determined in *Bell v. Harwood*. For the verdict *Id.* 308. could not be given in evidence in any future action which might be brought, either by or against the witness, because it would be a record between other parties. But the declarations of tenants are admissible evidence, after their death, to prove that a certain piece of land is parcel of the estate which they occupied; and proof, that they exercised acts of ownership in it (not resisted by contrary evidence), is decisive. So that they held as tenants to a deviser. And whether *parcel*, or not, of the thing demised, is always matter of evidence. So a grantee, when he appears to be a *bare* trustee, is a good witness to prove the execution of the deed to himself. As to *executors*, Lord HALE long since said, "an executor may be a witness in a cause concerning the estate, if he have not the surplusage given him by the will." It is clear therefore, that an executor *in trust* may be a witness; and it is now held no objection to an executor's testimony, that he may be liable to actions, as executor *de son tort*. Hence an executor, who takes not any beneficial interest, is a competent witness to prove the *sanity* of his testator,

And

Cowp. 612.

Sty. 482.

3. T. Rep. 309.

1. T. Rep. 262.

3. T. Rep. 309.

Id. 308.

2. T. Rep. 534.

Id. 55.

1. T. Rep. 704.

1. P. Wms.

287. 290.

1. Mod. 107.

Doug. oct.

241.

4. Burr. 2254.

Doug. oct.

139.

And with respect to the objection of interest, which, if substantiated, applies to the competency of a witness, if a person who is interested, execute a surrender or release of his interest, he may be examined as a witness; although the surrenderee, &c. refuse to accept the surrender or release: for every objection of interest proceeds on the presumption that it may bias the mind of the witness; but that presumption cannot operate, on proof of his having done all in his power to do away the interest. As to persons so nearly connected as husband and wife, it is now considered as a settled principle of law, from the supposed bias upon their minds, that they cannot, in any case, be admitted as witnesses for or against each other. So a child, without oath, cannot be received as a witness; though, under the sanction of one, provided he knows the nature of it, he certainly may. So, one convicted of petit-larceny and whipt, cannot be a witness. The crime, not the punishment which may attend conviction, renders such a person infamous, and of course incompetent. An infidel however, if sworn according to the manner and custom of his country, may give evidence; it having been long settled, that infidelity does not affect the competency of a witness.

An objection to the competency of a witness however, should be first made at the trial; for if made *then*, it may be shewn to have been released, or otherwise done away; therefore, on motion for a new trial, no objection to a witness can be received, which was not made at the trial. Nay, an objection to the competency of witnesses, *discovered after* trial, is not sufficient ground, of itself, for granting a new trial; though it may have some weight, if the applicant appears to have merits. And though the objection be properly made at the trial, yet if any doubt be entertained of it, it is usual to apply it to the *credit*, rather

Doug. oct.

140.

1. T. Rep. 719.

Id. 717.

4. Burr. 2251.

1. T. Rep. 309.

5. T. Rep. 27.

rather than the competence of a witness. Indeed the admissibility, or competence of evidence, must in a great measure result from particular circumstances: no rule can be general. Therefore, under circumstances, the 1. Black. 345. *dying declaration* of a person who had forged an instrument, that he had forged it, was admitted in evidence, even against purchasers for a valuable consideration.

In general, a witness must testify from his own knowledge of the fact, which he is called upon to prove, but may assist his memory, as to the circumstance, by *memoranda* taken at the time; yet if he does not speak from any recollection which he has, but merely from such *memoranda*, the *original* minutes must be produced by him, at the time of examination. This point, as a point of general practice, was considered and settled in the case of *Church v. Perkins*. That was an action of ejectment, in which a verdict was found for the plaintiff. On 3. T. Rep. 749. motion for a new trial, it appeared that the title of the plaintiff was not in dispute; but that the only question was, at what time of the year the annual holdings of the several tenants expired. That *Aldridge*, a witness, whose testimony was objected to, went round with the receiver of the rents to the different tenants, whose declarations respecting the times when they severally became tenants, were minuted down in a book at the time; some of the entries therein being made by *Aldridge*, and some by the receiver. When *Aldridge* was examined, the original book was *not* in court; but he spoke concerning the dates of the several tenancies, from *extracts* made by himself, out of that book; confessing, upon cross-examination, that he had no memory of his own of those specific facts; but that the evidence he was giving, as to those facts, was founded altogether upon the extracts, which he had made from the above-mentioned book. This was objected to, at

at the time, on the part of the defendants; upon the ground, that as the witness did not pretend to speak to those facts from his own recollection, he ought not to be permitted to give evidence from any extracts; but that the original book from whence they were taken, ought to be produced. The evidence was admitted, and the plaintiff had a verdict. On shewing cause against the rule, it was said, that although the original book itself, any more than the extracts, could be produced as evidence in themselves, yet the witness, who heard the declarations of the tenants, and either wrote the entries with his own hand, or saw them written by the receiver, might be permitted to refresh his own memory, by referring to either. That the objection only held, where the instrument or paper referred to, was brought forward as evidence in itself of a fact. And therefore, if it had been attempted to give those extracts to the officer of the court, to be read as evidence in the cause, there would have been a ground for the argument: but the evidence of the fact was given on the oath of *Aldridge*. That in the case of the *King v.*

21. Sl. Tr. 235. *the Duchess of Kingston*, Mr. *Leroche* was permitted to refresh his memory, from a copy of certain of his own memoranda, which copy too had been taken by another person, though under his direction. The counsel for the defendant insisted on the known distinction between cases where the witness swears from his own knowledge of the fact, though his memory may be assisted by memoranda, and where he does not speak from any recollection which he has, but merely from such memoranda; that in the latter case, it had always been required, that the original minutes should be produced; because of the great door which might otherwise be opened to fraud and concealment. For it might happen, in variety of instances, that something would appear upon the original paper it-

self,

self, which would do away the effect of the evidence, but which might be suppressed in a copy, and still more easily in an extract. The court did not appear to entertain much doubt as to the inadmissibility of the evidence, but said, that as it was a matter of such general practice, they would consider of it, that the rule might be finally settled for the future. Lord KENYON read the following note from a manuscript of Lord Ashburton: — Michaelmas Vacation, 1753, at Lincoln's-inn hall, before the Lord Chancellor. Mr. NOEL moved to suppress depositions on a certificate from the commissioners, before whom they had been taken, that the witness, whose depositions they were, refreshed her memory during examination, by minutes, consisting of six sheets of paper of her own hand-writing; the substance of which, she declared to them, she had set down from time to time, as the facts occurred to her memory; that five of the six sheets were drawn up in the form of a deposition, which she told them was done by the plaintiff's solicitor, whom she had requested to digest her notes and reduce them to some order; and that, after he had done so, she transcribed and altered them, wherever necessary, to make them consistent with her meaning. The certificate added further, that she declared the six sheets to have been entirely drawn up by herself, unassisted by any person; that as they apprehended they had no right to take the minutes from her, she had frequent recourse to them during examination: and this certificate was signed by all the commissioners. Mr. NOEL insisted that this practice was too dangerous to have the countenance of the court; and that there was sufficient foundation for the application to suppress the depositions. The motion was opposed by the attorney and solicitor general, who insisted that nothing was more frequent than to allow witnesses, in a court

court of law, the use of minutes to refresh their memory. That the only circumstance which seemed to distinguish this case from that, and give colour to the application, was the witness employing the plaintiff's attorney to digest her *memoranda*; but there could not be much weight in that circumstance, when it was considered, it was not pretended that there had been any tampering with the witness; and that she had carefully altered those papers wherever the attorney had mistaken her meaning; that she swore positively to the truth of every part of them; and though it might be improper to write the whole of a deposition before examination, yet where a person was to be examined to a number of dates, &c. it was very necessary to have some help of this kind. LORD CHANCELLOR. Whether there has been any tampering or no, I know not; but I know there has been a great mistake, both by the parties and the commissioners, who however did right, after their mistake, to lay it before the court. Should the court connive at such proceedings as these, depositions would really be no better than affidavits. For should a witness be permitted to use a paper, especially one drawn up by the attorney of one of the parties, though from *memoranda* furnished by the witness, I might as well let the attorney draw an affidavit for her, and use that instead of a deposition. She insists indeed, that she altered and amended it, but every body knows that slight alterations in a phrase make it convey very different ideas. To be sure in some cases a man may use papers at law; but I have known some Judges (and I think I adhere chiefly to that rule myself) let them use only papers drawn up, *as the facts happened*; all other papers I have known them put in their pockets; and if any had been offered which were drawn by the attorney, I should have reprimanded him severely. As to dates and names, which are merely technical, it is quite another thing. The commissioners

missioners should have rejected these depositions: but as they have fairly represented the fact, and the whole of the motion is to suppress the depositions, for the precedent sake, they shall be suppressed. And as publication is not passed, you may examine the witness. The Chancellor seemed to intimate, that he would have animadverted on the attorney, had it been made part of the motion.—

Mr. JUSTICE BULLER also read a manuscript note of *Tanner v. Taylor*. In an action for goods sold, the witness who proved the delivery, took it from an account which he had in his hand, being a copy, as he said, of the day-book, which he had left at home. It being objected, that the original ought to have been produced, Mr. BARON LEOCHE said, that if he would swear *positively* to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it: but if he could not from recollection swear to the delivery, any further than as finding them entered in his book, then the original should have been produced: and the witness saying he could not swear from recollection, the plaintiff was nonsuited.—LORD KENTON added, that the rule appeared to have been clearly settled, and every day's practice agreed with it: and comparing this case with the general rule, the court were clearly of opinion, that *Aldridge* the witness ought not to have been permitted to speak to facts from the extracts which he made use of at the trial.—Rule absolute for a new trial.

Hereford
Spring Ass.
1736.

HAVING said thus much, in general, as to *who* may, or may not, be received as a witness, I proceed, in the next place, to consider (in terms equally general) *what* instrumentary, or written evidence may be offered by either party. And here it is proper to interpose the general principle, that whether there be *any* evidence, must

Doug. 8vo.
375.

- be submitted to the Judge; but whether it be *sufficient* or not, is the sole province of the jury to determine. Before, however, I advert to the proof requisite to substantiate *instrumentary* evidence, it is necessary to observe, that if either party has any deed, instrument, letter, or notice in his power or custody, which should be produced in evidence on the trial, the adverse party, on giving *notice* for that purpose, may compel the production of it; and it must (on previous proof of service of the paper, if required,) be produced; otherwise, the party requiring it may give the counterpart, or a copy, in evidence; or, in case those do not exist, *parol* evidence of the contents of the thing demanded: proof however may previously be required of its being, at the time notice was given, in the power or custody of the party from whom it is required. The general leading rule of evidence is, that the *best* evidence within the power of the party, shall be produced at the trial; meaning (with reference to the point under consideration), that if the original can be had, it shall be required; but if *that* be lost, or in the hands of the opposite party, who will not produce it, then, in the case of a deed, a counterpart, or sometimes a copy; or of any paper, a copy, (or in the absence of both, *parol*,) is evidence to be admitted. In truth, when the original is in the hands of the adversary, a copy, or *parol* evidence is admitted, on the same principle as if the original be lost; for under such circumstances, of course the party has not the original to produce. And the rule applies to criminal, as well as to civil cases; for as to the general rules of evidence, not
- 2.T.Rep.201. any difference exists between them. Therefore, even in
- 3.T.Rep.306. a *penal* action, it has been held, that the *notice* alluded to is not confined to the defendant himself, but may be given either to his attorney or agent. Indeed, in all civil actions, it is given either by the party himself, his attorney

torney, or agent, to the other, his agent, or attorney. Though no man is *obliged* to produce evidence *against* 4. Burr. 2488. himself, yet the only consequence (to attain the ends of justice) of *notice* to produce it, is the admission of *inferior* evidence: the court therefore either compels the party to produce evidence which may prove against him, or leaves the refusal to do it, (after proper notice,) as a strong *presumption* to the jury. Nay, the court will do it, in many cases, under particular circumstances, by rule, before trial; especially if the party, from whom the production is wanted, applies for a favour.

AND when such a notice is given, the deed, or instrument, when produced, must *prima facie* be taken to have been duly executed; because the party requiring it, cannot come prepared at the trial to prove the execution of it: an instrument therefore coming out of the hands of the opposite party, must be taken to be proved; but if there be any fraud in the case, the other party is not precluded from impeaching it. For fraud, or covin, will avoid every kind of act; many instances of which are put in *Fermor's* 3. Co. 77. 80. case; and will invalidate in a court of law, as well as 81. in a court of equity; it being the judgment of law, upon 1. Burr. 397. facts and incidents. 474. 480. 482.

As to the proof of deeds and attested instruments in general, the practice is so well known and so uniform, that it may be needless to add a single word upon the subject. The party producing such evidence, must of course substantiate it; as to which the general rule is, that the deed, if in existence, must be proved, and not a copy of it; and that by one of the subscribing witnesses at least. If however the deed be not of a recent date, but of *thirty* years standing (which by long practice is considered as an *ancient* deed), it may be read, merely on

production, without any proof of its execution, even though the attesting witnesses be living. And it is no objection against reading a title deed, that the person against whom it is produced, is not a party to it. In the case of a deed which requires *oral* proof of its execution, if all the subscribing witnesses be dead, it can only be proved by substantiating their hand-writing; with the additional circumstance of their deaths: by those *media*, the best evidence is afforded of the due execution of the deed; for proving the hand-writing of the party to it, proves only *that* circumstance, and no more; of course cannot establish the sealing and delivery, which alone give legal effect and operation to the instrument. So, if the witnesses be abroad, and not amenable to any jurisdiction here; a practice, which, though it did not require, yet has certainly received, the *countenance* of the legislature. And that the ends of justice may be answered, if the attorney for a defendant, subscribing witness to an instrument on which the title of the plaintiff may depend, refuse to prove his attestation, he will incur a contempt of the court, and be obnoxious to an attachment. In the case of *Jupp v. Andrews*, an application was made against one *Johnson*, attorney for the defendant, for a contempt, in refusing to give evidence, upon being served with a *subpoena* ticket in court at the trial. *Johnson* was subscribing witness to an agreement, under which the ejectment was brought; and in consequence of his refusal to give evidence of attestation, &c. the plaintiff was nonsuited. The reason assigned was, that being defendant's attorney, he was not bound to give evidence to the prejudice of his client. On shewing cause against the attachment, an affidavit on the part of *Johnson* was read, stating, that seven tickets had before been annexed to the *subpoena*; whereas there ought to be only four persons names in one *subpoena*; and that no oath was tendered to him.

Doug. 8vo. 25.

26. Geo. 3.
c. 57. s. 38.

Cowp. 845.

LORD MANSFIELD. I think the attorney's original behaviour is aggravated by his present defence. By attesting an instrument, a man pledges himself to give evidence of it, whenever called upon. That he was attorney to the other side, is no reason for breaking his engagement with the plaintiff. An attorney has no privilege to refuse giving evidence of collateral facts. I have known an attorney obliged to prove his client having sworn and signed the answer, upon which he was indicted for perjury. I think the Judge who tried the cause, would have been warranted in committing this man; but he has taken the more prudent method, of leaving the matter to the court: Therefore let the rule be made absolute for an attachment.

N. B. *Johnson* then undertook to pay all costs of the nonsuit, and of the application: upon which the court ordered, that, on payment of them, the rule should be discharged; otherwise the attachment to issue.

As the legislature has, at various times, imposed particular stamp duties on particular deeds and instruments, they must, of course, when produced in evidence, appear by proper stamps to have satisfied those duties; otherwise, from the general tenor of the revenue laws, they cannot be received in evidence. For instance, a lease cannot be given in evidence without being stamped. It 3. Burr. 1563. is a matter of mere positive institution, and if the objection legally attaches, nothing can relieve against it; a lease 1. T. Rep. 737. in writing therefore, though not under seal, cannot be given in evidence, unless it be stamped.

To found a *presumption* that the premises are *leasehold*, and rebut a *presumption* that they are *freehold*, even the draught of a lease may be read in evidence. This point occurred on the trial at bar, in a writ of right patent, be-

3. Willf. 541. tween *Tyssen and Clarke*. A witness being called, deposed, that he had in his hand a paper-writing indorsed, "*draught*" of a lease from *Francis Tyssen*, formerly lord of the manor, to *Thomas Flanders*, of the ground in question, "for forty-one years." Another draught of a lease, of the like tenor, which was found among the writings of the demandant by his attorney, was also produced. It was objected, that these draughts could not be read in evidence, for that no proof had been given that such leases ever existed; that a lease might have been in contemplation, but never carried into execution; that there was a great difference between the *draught* of a lease and an examined copy thereof; the first does not prove that any lease ever existed, but the latter is some proof that a lease did once exist, and might be read, if the original be lost, destroyed, or could not be found. For the demandant it was answered, that some lease to *Flanders* must have once existed, because it had been proved that the premises in question had gone from *Flanders* to his widow, and from her to one *Roger Osbaldeston*, in a course of personal estate; that rent had been paid for it to the lord of the manor, as for a leasehold; that one *draught* came from, and was found among the papers of *Osbaldeston*; that the demandant being a posthumous child, and his writings in the court of chancery, there was a presumption that his counterpart of the lease might be lost; and that, taking all these circumstances together, there was reasonable ground for the court to permit the draughts to be read; which, however, were not offered as evidence to establish a lease, but to shew that a lease was once in contemplation; and that there was a great *presumption*, that the premises in question were leasehold, and not freehold; that the tenant had only given presumptive evidence of a grant in fee by the lord of the manor; and that the draughts agreeing with other circumstances already proved,

proved, ought to be read; that they were not offered as conclusive evidence of a lease, but were *admissible* to induce a *presumption* that a lease once existed; and properly encountered the title made by the tenant, which was no more than a title by presumption; and whether weak or strong, was for the consideration of the grand assize, and therefore ought to go to them. In reply it was insisted, the objection was not answered; that unless the draughts were to prove that such a lease was executed and once existed, they were no evidence at all; that search having been made, and no lease found, was (if any thing) rather a proof that no lease ever existed; for when evidence was offered of a deed supposed to be destroyed or lost, it was necessary, 1st, to prove that such deed once existed; 2dly, that it was destroyed or lost, and that diligent search had been made in proper places, and could not be found; or, 3dly, that it was in the hands of the adversary, who refused to produce it upon notice so to do; after having done which, reasonable proof might be given of a copy, or the contents of such deed: a draught alone did not prove that a deed did ever exist, without other circumstances, as letters between the parties, instructions to counsel, &c. &c.

LORD CHIEF JUSTICE DE GREY. The tenant claims under a grant from the lord in fee, of which he has only produced *presumptive* evidence. The demandant insists, that the premises in question are only leasehold. He has proved that rent has been paid for the same, as upon other similar leases, which have been produced and read by the steward of the court of the manor. He has also proved, that the premises have been enjoyed as part of the personal estate of *Thomas Flanders*, and that there is no instance to be found in the court books, of any grant of a *fee* by the lord in consequence of such precepts and returns thereof

as have been read; and therefore I think these draughts ought to be read, as a reasonable *presumptive evidence* that there may have been such a lease as this, once existing, especially as search has been properly made for a lease among the lord's deeds, and none can be found.—The rest of the Judges were of the same opinion.

AND in the case of a *Duchy* lease, subject to a *proviso*, that it shall be inrolled with the auditor, the certificate of the auditor on the margin, is sufficient evidence of the inrollment; as was ruled in *Kinnerley v. Orpe*. In an action *Doug. 8vo. 56.* of trespass, for fishing in the plaintiff's fishery, a verdict was found for the plaintiff; upon which a rule was obtained to shew cause why there should not be a new trial. The plaintiff derived title under a lease, dated in 1753, from the *duchy of Lancaster*, in which there was a *proviso*, that the lease and all assignments thereof should be inrolled within three months from the date, with the auditor of the Duchy; or otherwise should be void. The original lessor made a lease in 1777 to the plaintiff, for a term somewhat less than what remained unexpired of the original term. To prove the inrollment of the lease of 1753, a memorandum, or certificate, on the margin of the lease, was read, signed "*Peregrine Fury, Auditor.*" No evidence of inrollment of the second lease of 1777 was offered. The plaintiff had paid rent to the Duchy up to the time of trial. The application for a new trial was made on four grounds; one of which was, that there was not legal evidence of the inrollment of the first lease, for that an office copy of the inrollment ought to have been produced.

WILLES, J. The memorandum on the margin is the certificate of the proper officer, not of a private person, as

has been contended at the bar. I cannot distinguish between this case and that of a bargain and sale, where indorsement on the back of the deed by the proper officer, is always received as evidence of the inrollment. This case too is fortified by the circumstance of long possession under the lease. At any rate, third persons cannot avail themselves of a forfeiture of this sort; but I think the inrollment is sufficiently proved, even if it were against the grantor.

ASHHURST, J. I think the memorandum is sufficient evidence of the inrollment. For what other purpose was it made? But on the other ground, I do not think it competent to a third person, a *wrong-doer*, to take advantage of a defect which the grantor has waived; for the rent has been received up to this time.

BULLER, J. I think the lease, with the certificate under the hand of its own officer, would bind the crown itself. The proviso is, "that it shall be inrolled with the auditor." I cannot distinguish this case from that of a bargain and sale. The act of parliament in that case ^{17 H. 3. c. 16.} does not provide that the indorsement by the officer shall be evidence of inrollment, and yet it is constantly admitted.—Rule discharged.

No *parol* evidence however, can be permitted to contradict or explain away *that* which the parties themselves have deliberately reduced into writing. In an action (*Preston v. Mercan*) for the use and occupation of a house, ^{2 Black. 1149.} of which it was agreed in writing, "that a lease should be let by *Christiana Preston*, to *Abraham Gamage*, for twenty-one years, at 26*l.* *per annum*, to commence from Michaelmas then next;" *Gamage* died; and made *Mercan* his executor, who paid 26*l.* into court for one year's rent.

rent. On the trial, the plaintiff offered to shew, by *parol* evidence, that, besides the 26l. *per annum*, the defendant had agreed to pay 2l. 12s. 6d. a-year, being the ground-rent of the premises, to the ground landlord; but no evidence was offered of the actual payment of such ground-rent, during the testator's life; without which, DE GREY, Ch. J. thought such *parol* evidence inadmissible, and nonsuited the plaintiff. It was moved to set aside the nonsuit; alledging that the evidence went not to alter or vary, but to explain the agreement. That the writing was not a solemn deed, or will, but a mere executory act; and had a bill in chancery been brought to carry it into execution, *parol* evidence would have been admitted to prove the agreement to pay the ground-rent. For in *Joyes v. Statham*, *parol* evidence was admitted to shew, that an agreement for a lease at 9l. a-year was to be clear of taxes.

3. Atk. 388.

BLACKSTONE, J. (*absente* GOULD.) I am clearly of opinion, that the Lord Chief Justice did right in rejecting this evidence. Courts should be very cautious in admitting any evidence to supply or explain written agreements. Else the statute of Frauds would be eluded, and the same uncertainty introduced, by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It never ought to be suffered, so as to contradict or explain away an explicit agreement; for that is in effect to vary it. Here is a positive agreement, that the tenant shall pay 26l.; shall we admit proof that this means 28l. 12s. 6d.? What is it to the tenant, to whom rent is to be paid, so as he is obliged to pay more than his contract expresses? We can neither alter the rent nor the term, the two things expressed in this agreement. With respect to *collateral* matters it might be otherwise. He might shew who

to put the house in repair, or the like, concerning which nothing is said; but he cannot, by *parol* evidence, shorten the term to fourteen, or extend it to twenty-five years, or make the rent other than 26*l.* *per annum*. The case in *Atkins* is of a mere executory act; in which the master was to settle the proper covenants, therefore had a right to enquire who was to pay the taxes. Besides, there were strong suggestions of fraud in making the written agreement, as one party could neither read nor write,

NARES, J. of the same opinion. Great caution should be used in admitting explanatory evidence, especially in a case of specific rent. This is an instrument in writing, and would have nonsuited the plaintiff, before the statute 11. G. 2. c. 19. sect. 14.—Rule discharged.

BUT a mere receipt may be explained, and is not conclusive against the party signing it. 1.T.Rep.371.

AND a party may (by *parol*) prove other considerations than those which are expressed in a deed, for the purpose of establishing what the *real* consideration was. In *The King v. the Inhabitants of Scammonden*, it appeared that 3.T.Rep.474. a pauper being legally settled in a place called *Soyland*, entered into an agreement with one *Harrison* for the purchase of an estate in *Rishworth* for 28*l.* The consideration mentioned in the deeds, and in the receipt indorsed, was 28*l.* but the appellants produced *parol* evidence, to prove that, before the deeds were executed, the vendor declared, that as the agreement was not in writing he was not bound by it, and having since had 30*l.* offered for the estate, would not take less; nor would execute the deeds unless the purchase-money were made up that sum. Upon which the pauper advanced 1*l.* 15*s.* more, which, with five shillings owing from *Harrison* to the pauper,

pauper, was insisted made up the sum of 30*l.* but the deeds were not altered, and the consideration therein mentioned was left according to the original agreement, viz. 28*l.* The counsel for the appellants contended, that this was a *bonâ fide* purchase for 30*l.* The sessions were of opinion, that no *parol* evidence could be given to contradict the consideration mentioned in the deeds. The estate purchased was the estate of *Harrison's* wife; and in the deed there was a covenant from *Harrison*, that he and his wife would levy a fine unto *C. Bottomley*, in fee of the premises at the costs of *Bottomley*; towards the expence of which fine *C. Bottomley* left in the hands of his attorney four guineas. The pauper resided above three months upon the premises, and afterwards sold them to his brother *J. Bottomley*. To this conveyance *Harrison* and his wife were parties; and it recited *Harrison's* covenant in the former deed to levy a fine; but as such a fine had not then been levied, it was agreed, that instead thereof, *Harrison* and his wife should acknowledge and levy a fine of the premises unto *Bottomley* in fee, which fine was, in Hilary Term 1787, levied accordingly; part of the expence of levying it was discharged by the four guineas so left in the hands of the attorney by the pauper, and the other part was paid by *Bottomley*.—The sessions were of opinion that the sum of four guineas was to be considered as part of the consideration under the act of parliament, and that *C. Bottomley*, by such purchase, gained a settlement in *Rishwarth*. It was contended in B. R. that the sessions properly rejected the *parol* evidence, which was offered to contradict the consideration mentioned in the deed: it being a general rule, that if a contract be reduced into writing, *à fortiori* if a deed, no *parol* evidence could be admitted to contradict it. And that in *Clarkson v. Haw* way, it was held that the grantee could not give *parol* evidence to prove *blood and kindred* to have been the consideration

ration of the conveyance, the consideration for which was expressed in the deed to be an annuity to the grantor, though the deed in that case was set aside on the ground of fraud. But Lord KENYON said, it was clear that the party might prove other considerations than those expressed in the deed. It is permitted in all cases of covenants to stand seised to uses. And in *Filmer v. Gott*, 7 Bro.P.C. 70. where the considerations mentioned in the deed, were 10,000l. and *natural love and affection*, the lords commissioners of the great seal directed an issue to try whether *natural love and affection* formed any part of the consideration, the estates being worth near 30,000l. On appeal to the house of lords this was confirmed; and the jury on the trial of the issue finding that *natural love and affection* constituted no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.

In the case of a *mixed* possession, a commission under the seal of the court of exchequer is *admissible*, but *not conclusive* evidence. In *Tosker v. Duke of Beaufort*, 1. Bur. 248. a new trial was moved for, on the ground that the Judge had admitted a commission, under the seal of the court of exchequer, P. 33. Eliz. rotulo 290. to be given in evidence, although objected at the trial, as being *res inter alios acta*; of which the *Beaufort* family could have no notice, nor opportunity to defend against, and therefore should not affect them; consequently ought not to have been admitted as evidence; for the same reason that a verdict, in a cause between other parties, cannot be given in evidence in a cause between strangers to the former cause. To which commission was returned an inquisition taken the 9th of April, 33d Eliz. whereby it was found that the prior of *St. Switbin*, in right of his priory, was seised of the lands in question, as part of the manor of *Hinton Dewbury*, and that from the dissolution of the priory, king

king *H. 8.* king *E. 6.* and queen *Mary*, were seized, and queen *Elizabeth* herself in the same right, to the 27th of *May* then last past. There were also returned the interrogatories administered on her majesty's behalf, and the depositions taken thereon. The substance of the report was, that the Judge had admitted the commission, the return, and depositions, to be read in evidence; holding them to be *admissible* evidence, though not conclusive. That there was much *parol* evidence of the possession of both parties; and had been a *mixed* possession: but that he, in direction to the jury, laid great stress on the commission, and without its assistance should have thought the verdict for the plaintiff to have been a very hard one.—The court was of opinion, that the evidence was *admissible*, though not conclusive, therefore that it was properly received: consequently, the rule for a new trial was discharged. But in the *interim*, whilst the question was depending before the court (who took time to advise), the *Duke of Beaufort*, the defendant, died. Whereupon, on behalf of the plaintiff, it was moved for leave to enter up judgment, as of the next Term after the verdict; which was the Term in which he might have entered it up, if the motion had not obstructed it: which was afterwards granted.

2. Leon. 187.

1 Sid. 462.

1. Vent. 58.

WHERE the plaintiff produces an original lease of long term, and proves also possession under it, all *mesne* assignments must necessarily be *presumed*; as in *Goodwin* 2. Black. 11218. *v. Baxter*. The lessor of the plaintiff claimed title under a lease for 1000 years: he produced the original lease, proved possession in himself, and those under whom he claimed, ever since 6. *Ann.* and also shewed ONE *mesne* assignment in 16. *Jac. 1.* The Judge who tried the cause thought it incumbent on the plaintiff to prove all the *mesne* assignments; for not doing which, the plaintiff was

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nonfuit: but he afterwards changed his opinion, and so reported it to the court of common pleas. The court was clear that the *second* opinion was right, and that it should have been left to the jury, with a recommendation to *presume all the mesne assignments*: the nonfuit, therefore, was set aside, without costs.

So, in the case of a copyhold, it is no objection to the title of trustees, that from the time of the original devise, 1 H. Blac. 447, to a certain period, the former trustees do not appear to have been admitted by the rolls of the manor; provided there have been regular surrenders and admittances for a considerable time, (as for instance, above forty years,) *since that period*: for it will be PRESUMED, that surrenders and admittances were duly made, *before that period*; more especially, if the rent has been paid during the whole time.

So, if a record be found in the proper office, with some words *obliterated*, it must be *presumed* to have been always right; and no *parol* evidence ought to be admitted to vitiate it; though it may, it is said, be admitted for the purpose of proving it to be *right*.

EVEN a grant or charter from the crown, which ought to be by matter of record, may, under circumstances, be *presumed*, and that though within the time of legal memory; as in the *Mayor of Hull v. Horner*. In that case, Cowp. 102. Lord MANSFIELD said,—With regard to admitting evidence to satisfy a jury that a charter did exist within time of memory, which is not produced by record, my opinion is, that *all evidence is according to the subject matter to which it is applied*. There is great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time which operates as a bar:

as where the statute of Limitations is pleaded in bar to a debt; though the jury be satisfied that the debt is due, it is still a bar: so in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence, shewing there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time, used merely, *by way of evidence*, may be left to the jury to be credited or not, and to draw their inference one way or the other, according to circumstances. For instance, there is no statute of limitations which bars an action upon a bond: but there is a time when a jury may *presume* the debt to be discharged: as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, as by shewing the party *not* to be in circumstances to pay, or a recent acknowledgment of the debt, the jury *must* say the contrary. If a foundation can be laid that a *record* or a *deed* existed, and was afterwards lost, it may be supplied by the next best evidence to be had; or if it cannot be shewn that it ever existed, yet, *enjoyment under a title*, which can only be by record, is strong evidence to be left to a jury that it did *once* exist. I do not know an instance in which *proof may not be supplied*. These are general rules, and it would be mischievous if it were to be laid down, that there can be no *presumption* since the time of Richard 1. to confirm a title by charter. In Lord Purbeck's case, the letters patent, which were the only proper evidence of his title, could not be found; and there was no proof of the record having been lost: but he had sat in parliament, had levied a fine of his honours to Charles the Second, and I think enjoyed them to the time of his death. All the other facts were

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subsequent to the creation, yet the house of lords were of opinion in favour of the claim, and *presumed* that the letters patent had existed. Indeed before the decision, the bills of the letters patent were said to be found at the privy-seal office: still that was only presumptive evidence; for the king might have recalled it before it had passed the great seal. But the case of *Bedle v. Beard*, 12. Co. 5. and determined by lord chancellor *Ellsmere*, with the assistance of the Judges upon deliberation, is a case in point of very great authority. That case states, that in 31. Ed. 1. the king (being seised of the manor of *Kimbolton*, to which the advowson of *Kimbolton* was appendant), by letters patent, granted the manor with the appurtenances, to *H. de Bohun*, Earl of *Hereford*, in tail-general. *Humphrey de Bohun*, the issue in tail, in 40. Ed. 3. granted the advowson to the prior of *Stoneley* and his successors, by which it became impropriate. The points were two, whether the grant of the manor *cum pertinentiis* passed the advowson? and adjudged that it could not. Secondly, whether the grant by tenant in tail was not void? On this second point it was resolved by Lord *ELLSMERE* and the principal Judges, that notwithstanding the advowson did not pass by the grant of the king under the words *cum pertinentiis*, and so the issue in tail had nothing in it at the time of this grant to the prior, yet it should then (4. Jac. 1.) be intended in respect of the ancient and continual possession, that there was a lawful grant of the king to *Humphrey*, so that he might lawfully grant to the priory. For all shall be presumed to have been solemnly done, rather than that ancient grants should be called in question, which were necessary to the perfection of the thing, though the grant cannot now be shewn. And it was further observed, that ancient possession would injure, instead of strengthening title, if after a succession of ages, and the decease of parties,

parties, objections should prevail which might have been answered in the life-time of the parties, and if well founded, would most probably have been sooner made. I remember in general, though I cannot recollect the particulars of it, a case in the *Duchy* court, between the king and Mr. *Brown*, of *Snelbrook*. It was 9 Geo. 3. c. 16. before the *Nullum Tempus* bill. The evidence in support of the title, was a possession and enjoyment of 100 years; and I held, that though such possession and enjoyment could not conclude as a positive bar, because there was no statute of limitations against the crown, yet it might operate as evidence against the crown, of right in the defendant, if the claim could have a legal commencement; though such commencement could not be shewn. In questions of this kind, possession goes a great way: but there is no positive rule which says, that 150 years possession, or any other length of time within memory, is a sufficient ground to presume a charter. In the case of a supposed bye-law, usage is allowed to support it, without any proof of the existence of such a bye-law, or of the loss of it. But the principle is a right one, namely, in favour of rights which parties have long been in the quiet possession of. I have myself taken it to be established in point of law, that though the record be not produced, nor any proof adduced of its being lost, yet, under circumstances, it may be left to the consideration of a jury, or of a court of equity, if the case comes properly before them, whether there is not a sufficient ground to presume a charter? Therefore in the present case, taking it for granted that such charter would have given the plaintiff a title, I think it was properly left to the jury, whether they would presume such grant?"

Camp. 103.

So, in the case of *Powell v. Milbank*, before Lord Mansfield, at the sittings after Michaelmas Term, 1772. The plain-

plaintiff declared for money had and received. On *non assumpsit* pleaded, it appeared in evidence, that the chapel of *Chester le Street*, in the county of *Durham*, was in the crown, from the dissolution, to the time of *Jac. 1.* who by letters patent under the seal of *England*, bearing date 26th of *July*, 1618, granted to Sir *James Ouchterlong* and *Richard Gurnard*, their heirs and assigns, all that the deanery, prebend, rectory, and vicarage of the collegiate church of *Chester le Street*, in the bishopric of *Durham*, with the following exception: "*exceptis tamen semper et extra hanc præsentem concessionem nostram nobis hæredibus et successoribus nostris omnino reservatis omnibus et singulis advocatibus donationibus liberis dispositionibus et jur. personal. om. et singul. ecclesiasticar. vicar. capell. et al. beneficior. ecclesiasticor. quorumcumque præmiss. superius per præsentem præconcess. aut alicui inde parti vel parcellæ quoquo modo spectant. pertinent. incident. appenden. vel incumben.*" In 1629, anno 5. *Car. 1.* the premises came by mesne conveyances to the *Hedworth* family, who afterwards granted to Sir *Ralph Milbanke*. In 1694, Mr. *Hedworth* presented Mr. *Conyers* to the curacy of *Chester le Street*, and in 1735 Mr. *Lambe* was presented by a descendant of the *Hedworth* family, and continued in possession till 1769, when Sir *Ralph Milbanke* presented the defendant. Upon these facts, one point insisted on by the plaintiff was, that the exception in the grant left the title to this curacy in the crown. But Lord MANSFIELD left it to the jury to say, whether from the two adverse nominations, and possession under them, by the *Hedworth* family, they would not presume a grant from the crown of the right of presentation to the curacy. The jury presumed a grant, and found a verdict accordingly.

So under circumstances, a jury may presume an actual *Ante*, 191. ouster of one tenant in common, by the other.

Ance, 111.
102. 261.

So, of the common notice to quit; as well as of an agreement to continue possession. Or of the premises being leasehold, and not freehold.

4.T.Rep 682.

So, in the case of a *plain* trust, where the trustees were directed to convey to a devisee, on his attaining the age of *twenty-one*, the jury may be directed to *presume* a conveyance accordingly; at any time afterwards, though much less than twenty years. Nay, though there has been a *previous illegal* marriage, yet, under circumstances, it may be left to a jury to *presume* a *subsequent* legal one: as in *Wilkinson v. Payne*.

Id. 468
Post,

HERE, as to the doctrine of *presumption*, which has considerable weight in the scale of evidence, this general principle must be attended to; namely, that length of time *alone* is nothing; for *presumption* must operate from some facts or circumstances arising within that time.

2. Burr. 1065.

Upon this point, the case of *Bridges v. the Duke of Chandos* affords considerable information. The plaintiff had a verdict. On motion for a new trial, it appeared that the duke would have defended his title, by setting up a common recovery, which had been suffered by the remainderman in tail, and which was produced and proved; but being unable to give any evidence of an *actual* surrender of the life-estate, (which, for the plaintiff, was urged to be necessary, in order to enable the tenant in tail in remainder to make a good tenant to the *præcipe*), his counsel insisted, at the trial, "that *that* ought, *after so long a time*, [about 32 years] "to be *presumed*; even though they should not "give any evidence relating to such surrender." The Judge however was of opinion, "that a surrender by "tenant for life could *not* be presumed, when no evidence "had been given to render it probable; and when possession had not gone with the recovery, but continued "in tenant for life, till the time of bringing the eject-
"ment."

"ment:" and accordingly directed the jury to find for the plaintiff. On the motion for a new trial, the defendant's counsel relied upon the case of *Webb v. Green-ville*, where the plaintiff claimed under an old entail in a family settlement, by which part of the estate appeared to have been in jointure at the time the son suffered a common recovery; and the defendant, who claimed title under the recovery, not being able to shew a surrender of the mother's estate *for life*, it was insisted, "there was no tenant to the *præcipe* for that part; and that the remainder, under which the lessor claimed, was not barred." To obviate which, it was insisted, "that at that *distance of time*, a surrender should be *presumed*;" and to fortify the presumption, offered to produce (in evidence) the debt-book of an attorney deceased, wherein he had charged for suffering the recovery; two articles of which charge were, "for drawing a surrender of the mother, 20s." and, "for engrossing two parts thereof, 20s. more:" and that it appeared by the book, "that the bill was paid." This being objected to, as improper evidence, the court was of opinion to allow it: for it was a circumstance material upon the inquiry into the unreasonableness of presuming a surrender, and could not be suspected to be done for the purpose: if the attorney had been living, he might have been examined to it; after his death, it was the best evidence, and was accordingly read. After which, the court declared, "*without* that circumstance, they would have *presumed* a surrender;" and desired it might be taken notice of, "that they did not require any evidence to fortify the presumption, after such a length of time." They cited also *Green v. Froud*, where it is said, that in an ejectment, upon a trial at bar, for lands in *ancient demesne*, there was shewn a recovery to cut off an entail which had been suffered a *long time*, and possession gone accordingly. It appeared that part of the land was leased *for life*; and the recovery (with a single voucher) was

2. Stra. 1129.

1. Ventr. 257.

3. Keb. 310.

1. Mod. 117.

Fig. on Com. Recov. 41.

suffered by him in reversion; and so no tenant to the *præcipe*, for those lands. But as possession had followed it for so long time, the court said, "they would presume" a surrender:" as in an appropriation of great antiquity there had been presumed a licence, though none appeared.

Cro. Jac. 455.
2. Lut. 1549.
3. Co. 38. b.

That in the case of *Dame Griffin v. Stanbope*, a common recovery being produced, counsel for the defendant pressed the *Lady Griffin's* counsel to prove who was tenant to the *præcipe*, at the time of the recovery. But the court would not allow it; for it should be intended to be a good recovery; and if otherwise, the proof ought to be made by the other party. In an ancient recovery therefore, if nothing appeared to the contrary, such a surrender should be presumed: and tenant for life continuing in possession makes no difference. That all the cases lay the whole stress of determination, solely on the length of time from actual suffering the recovery; without any regard to the subsequent continuation of the life-estate, or to any other circumstance. That if it should be objected, "that in the present case the remainder-man in tail had not sufficient estate and power to suffer the recovery," the answer was, that if there was a conditional surrender of the tenant for life, then he had power: and as nothing appeared to the contrary, but there might be such a surrender, it must be presumed; and the statute only limits the time within which the presumption ought to arise.

Pig. Com.
Rec. 41.

14. Geo. 2.
c. 20. s. 5.

THE plaintiff's counsel contended, there could be no presumption without some facts to ground it upon. That in *Greenville's Case*, there was a very strong presumption, arising from the articles in the attorney's bill; proof whereof the court allowed to be entered into, and received satisfaction from. That no case existed, where the presumption of a surrender had been raised, without possession accompanying and following the recovery. That in *Green v. Freud*, possession had followed the recovery for a long

long time; and was the reason given by the court for making the presumption. And in *Griffin v. Stanhope*, the person who suffered the recovery, was himself tenant in tail; and possession had gone with the recovery. That the latter part of the report of *Greenville's Case* was inconsistent with the former; for it says, the court declared they did not require any evidence to fortify the presumption after such a length of time; yet it appears, by the former part of the case, that "they had entered into such evidence, after it had been objected to, as improper; and the objection had been considered and over-ruled." That as to 14. G. 2. c. 20. s. 5. it never meant to alter the law, so as to give power to a person to suffer a recovery, who had not power before (which remainder-man in tail had not); being expressly confined to "persons *having* a sufficient estate and power to suffer the same." That the statute of Limitations only takes place from the time of the title accruing. That the rule, in all cases of the kind, must in reason and common sense, necessarily be understood to relate to the length of time elapsed since the tenant in tail came into possession; not to the length of time since suffering the recovery: for where he has been a long time in possession, and done nothing to complete and confirm his former act, it is reasonable to presume, that all was rightly transacted before; because, if he knew his former act to be defective, and his title insufficient, he would not have neglected to set it right as soon as it was in his power. But no such *presumption* could arise from the mere antiquity of the recovery, prior to the possession of tenant in tail.

LORD MANSFIELD. I was counsel in the case of *Mr. Greenville*, and remember well, the point in evidence was strongly litigated. The attorney, who had been concerned in the common recovery, was a *Mr. Edwards* of Bristol. The entry in his bill-book was made at the time of the

transaction; and a receipt given upon the bill which contained the articles, for drawing and engrossing the surrender. There was, therefore, *positive proof*, in *that case*, of an *actual* surrender. The jointress too, had been dead a vast number of years; the person who suffered the recovery, and his son after him, had both of them (during their respective lives) sufficient opportunity to have set it right, after they came into possession, if they had known or suspected it to have been defective: which was certainly a *presumption*, "that it was regular, and not defective." I am confident, that all the court did, or intended to do, in that case, was only to take care that it should be understood, that they did *not* mean to shake the authority of any one case which had been founded upon *presumption*; and that they would not require positive proof of a surrender in any case where there was sufficient *presumption* of it. The report is incorrect, considered as a foundation for a principle or rule of property; though it might be enough to serve the taker of such a note for a memorandum, to refresh his own recollection. If that be so, then consider the present case upon principle. There are *two* sorts of *presumption*; one a presumption of *law*, not to be contradicted; the other, a *species* of evidence; which (*LATTER*) must have a *ground* to stand upon—something from whence it is to arise. It is now fully established, that tenant in tail may, if he pleases, either turn his estate-tail into a fee, or alienate it for his own benefit, by duly suffering a common recovery. But he must have a sufficient estate and power to qualify him to suffer such recovery. He must either be tenant in tail in possession, or must have the concurrence of the freeholder, who claims under the same settlement. This principle is adhered to by 14. G. 2. c. 20. Tenant for life, whose consent is necessary to the tenant in tail in remainder, to enable him to cut off the entail, is not the lessee of the land under a beneficial lease; but the original tenant for life claiming

under

under the family settlement; having a life-estate settled upon him, prior (in order of succession) to the other's remainder in tail. Where a person has power to suffer a recovery, and thereby bar the estate tail, *omnia præsumuntur ritè et solemniter acta*, until the contrary appears: and it is reasonable it should be so; but if the contrary appear, there is an end of the presumption. This was the case of *the Earl of Suffolk's* recovery, on a trial at bar in 2. Burr. 1073. this court in Easter Term 1747. There the contrary did appear, and the presumption was thereby destroyed. There were blundering deeds actually produced, which appeared clearly to be wrong; and it was manifest, upon the evidence disclosed, that there was no good tenant to the *præcipe*. It was therefore impossible for the court, in that case, to *presume* "there was one." But if a man has power to suffer a recovery, that is a solid ground for presuming all was done rightly and regularly, unless something to the contrary appear. So where the freeholder is trustee for the tenant in tail himself, and under his power and direction, it is a reasonable cause for presuming, "that every thing was regularly transacted." So where the person interested to object against the validity of a recovery, has had opportunity to make objections to it, but instead of doing so, has acquiesced under it, and not disputed its validity; it is a presumption that all was regular, inasmuch as he never did object to it. But there can be no *presumption* of the *nature of evidence* in any case, *without something* from whence to make it;—some ground to found the *presumption* on. Whereas here is absolutely nothing from whence to presume; no sort of ground to build any presumption upon. The single pretence to any, the least ground of presumption in the present case, can be only this, "that no tenant in tail in remainder, would suffer a recovery without first obtaining the surrender of the life-estate, in order to make it valid and effectual." Even that ground (slight as it is) will

will not hold in the case before us : for it does not appear, that the remainder-man in tail, who suffered the recovery, had the least *intention* to include those *particular* lands in the recovery which he suffered, and had a full power in himself alone to suffer of all the rest of the estate, whereof he was at that time tenant in tail in *possession*. He was then in possession of the manor of *Keynsham*, and of other lands in *Keynsham*, sufficient to answer the general description used in the recovery, relating to such part of the recovered estate as lay in *Keynsham*. He probably knew, or was informed by his counsel or agents, that he could have no such power over the settled part, without obtaining a surrender of the life-estate. He might perhaps be satisfied, that he could not obtain a surrender of the life-estate in these settled lands; or might have attempted to obtain it, and failed. If the mere fact of remainder-man *in tail* suffering a recovery, was alone sufficient to ground the presumption of a surrender of the life-estate, it would be in the power of every remainder-man in tail to bar the estate-tail, notwithstanding the tenant for life should absolutely refuse to join with them in suffering a recovery. Therefore it is necessary there should be *facts and circumstances* to ground the *presumption* of such a surrender. Here the tenant in tail in remainder (the life-estate under the same settlement still subsisting at the time of his suffering the recovery) had no power to alien or to bar : and there is nothing from whence to presume a surrender of the life-estate, to enable him to do so. If he had a power to bar or alien, then indeed no presumption could have been too large, in order to prevent slips in legal forms and methods of conveyance, and effectuate the intention of a person who had a legal right to do such an act. The act of 14. G. 2. c. 20. means to preserve the same negative to persons claiming under the family settlement, as they had before. And no agreement can be drawn

drawn in the present case from length of time; because the jointress died but in 1759, and the ejectment was instantly brought.

MR. J. DENISON and Mr. J. WILMOT concurred: and the latter added, that he had no notion of a *presumption* without some facts or circumstances to found it upon. It would be inferring something seen, from something not seen. Length of time *alone* is nothing. The *presumption* must arise from some facts or circumstances arising within that time.

LORD MANSFIELD. There is no ground for a *presumption* that there was any surrender by the tenant for life. Here are two particular reasons against making any such presumption; one, there does not appear to have been any intention in the remainder-man in tail, to suffer a recovery of these particular lands: the other, that there was no possession at all under this recovery; on the contrary, the ejectment was brought, and the validity of the recovery put in litigation, immediately after the death of tenant for life. If the eldest son, who has a remainder in tail under a family settlement, should privately suffer a common recovery, and his father live many years afterwards, it might as well be argued, that length of time, from the date of the recovery, should induce a *presumption* that the father surrendered his estate for life. And his Lordship declared himself as clear, that if there had been a long possession, by tenant in tail, after the death of tenant for life, though such possession might be ascribed to the tail, the *presumption* ought to have been made on the ground of acquiescence under it, and the arising probability, that the parties knew the recovery was not defective. Estates of property ought (his Lordship added) to be generally known; not left upon loose notes, which rather serve

serve to confound principles than to confirm them: and he would have it understood, that possession of tenant in tail, after the death of tenant for life, leaves a ground for presumption that there was a surrender; but in the present case, there was no possession after the death of tenant for life, the ejectment was brought immediately.—Rule discharged.

Skeyn. 227.
Doug. 8vo.
25. 39.

EVERY presumption however may be encountered, or, speak more technically, *rebutted*, by contrary evidence. There is a technical phrase for it, in the case of executorship it is called, rebutting an equity. The form of a fine, for instance, is to give title to the donee, when in truth it is for the convenience of the donor; hence, from constant usage, arises the presumption, that it is levied for his use; but this, like all other presumptions, may be rebutted in favor of the donee, by *parole* evidence, showing that to have been the intention of the parties. So, an implied revocation of a will, may be rebutted by parole evidence. Even in the case of cross-remainders, by implication, the rule seems to be, that wherever cross-remainders are to be raised by implication, between two and no more, the presumption is in favour of cross-remainders; but where between more than two, the presumption is against them. But that presumption may be answered, by circumstances of plain and manifest intention either way, which is a qualification of the rule laid down in former cases; the cases which say, there shall not be cross-remainders between more than two. Even Lord Hardwicke inclined that way, and so do the cases of *Comb v. Hill*, *Williams v. Brown*, and some others. But the rule is, to take it with the qualification above stated.

II.
Cowp. 780.
800.

2. Stra. 969.
996.

It is often necessary to substantiate proceedings which have taken place, have been determined, or remain pending.

in another court. To prove which, an examined copy of the original is in general produced, properly stamped, (if necessary,) by the person who examined it with the original; who is also generally sworn to the examination, and that the paper produced is a true copy. As to this point, the correct principle is, as laid down by Lord HOLT, in *Lynch v. Clerke*, "that wherever an *original* is of a *public* nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence." 3. Salk. 154.

In *Lucas v. Fulford*, the plaintiff offered to give in evidence an examined copy of a bill in chancery, contained in two *close* sheets of paper, each stamped with treble sixpenny stamps; but the matter was equal in quantity to forty office copy sheets: and also an examined copy of an amended bill, in *three* close sheets, each stamped with treble sixpenny stamps, the matter whereof would have extended to sixty office sheets. By the stamp acts, 9. & 10. W. 3. c. 25. f. 64. &c. every copy of proceeding in chancery is charged with a duty of three penny stamps on each sheet; otherwise, cannot be given in evidence. And it is also provided, that all proceedings in any court shall be written in the usual manner. Verdict for the plaintiff, subject to the opinion of B. R. whether or no this evidence ought to have been admitted.—LORD MANSFIELD. The whole question is, whether it is necessary to give office copies in evidence in all courts. In causes depending before the court of chancery, office copies of proceedings therein, are the very records of the court, and prove themselves: no other copy can be there produced. In other courts, even office copies of chancery proceedings, must be proved to be genuine, by parol evidence. Two clauses of the stamp acts are the only ones to be considered. It must first be observed, that when stamps were originally imposed, there were two kinds of copies in common use: one, an office copy,

copy, to be made use of in the court to which the cause belonged; which contained only a stated number of words, by immemorial custom, probably introduced to enlarge the fees of the officers: the other, a common *copy*, to be used when proved in any other court or place. Then comes the act, and lays (in one clause) a duty upon every sheet of copy; and the next clause directs all proceedings in any court to be wrote in the same manner as before. Is this latter clause a legislative provision, that office copies *only* shall be used in evidence, where they were not used before? It is not to be conceived, that in order to raise so small a duty (for originally it was only one penny per sheet), the legislature intended to put the parties to the expence of sixty pounds, to take office copies merely to give in evidence. It has been determined, that the stamp duties do not extend to any proceedings before either house of parliament. It is a question of general importance, and proper to be well considered, before it be finally determined. But for my part, I have no doubt.—The *posse* was afterwards ordered to be delivered to the plaintiff.

Cowp. 17.

IN *Jones v. Randall*, which was an action upon a wager whether a decree of the court of chancery would or would not be reversed in the house of lords, a verdict was found for the plaintiff. On a rule to shew cause why there should not be a new trial, three objections were made to the sufficiency of the evidence given at the trial: first, that a copy of the reversal only, and not the *minute book* itself was produced: secondly, if such copy was admissible, yet it ought to have been upon *stamps*: thirdly, that the previous proceedings ought to have been shewn, whereas the decree only was produced.—LORD MANSFIELD. The *minutes* of the judgment are the solemn judgment itself: not a word is added upon the journals

and a copy of them may certainly be read in evidence; for the inconvenience would be endless, if the journals of the house of lords were to be carried all over the kingdom. As to such copy being upon stamps, it was decided in Queen Anne's time, by the opinion of all the Judges of England, that copies of the proceedings of parliament need *not* be stamped. Formerly a doubt was entertained, whether the minutes of the house of commons were admissible, because it is not a court of record; but the journals of the house of lords have always been admitted, even in criminal cases.—ASTON, J. They were so in *Rex v. Oates*. As to the previous proceedings, the court held there was no necessity to shew them; for the single point in issue at the trial was, "whether the decree of the court of chancery was reversed," not what the previous proceedings were; therefore, proof of the decree, and of its being reversed, was sufficient. St. Tr. vol. 4. p. 44.

FORMERLY it was a general received opinion in the profession, that copies only of records were admissible, if the originals were in existence: hence, on a motion for a rule on the *East-India Company* to shew cause why they should not permit their original *transfer books* to be produced, on the ground that copies from them should not be read, counsel stated the principle to be as above mentioned; and said there had been many nonsuits for want of producing the original journals of the house of commons. But the court *denied* that the rule was so; and stated several instances where copies of matters, *not* of record, are admissible; as, copies of court rolls, parish registers, &c. and LORD MANSFIELD expressly said, that copies of the *journals of parliament* are evidence; and that he particularly remembered their being admitted in a trial at bar, in a cause in which he was leading counsel for Sir *John Williams Wynne v. Myddelton*, Sheriff of *Denbigh-shire*, Doug. 8vo. 593.

shire, on an action for a false return : that Mr. Onslow, then speaker of the house of commons, made a point with his Lordship, that the copies should be offered in evidence, though nothing would have been so easy, in that case, as to produce the original journals. The court added, that the reason, *ab inconvenienti*, for holding it not necessary to produce records, applied with still greater force to such public books as the transfer books of the *East-India Company*; for the utmost confusion would arise, if they could be conveyed to the most distant part of the kingdom, whenever their contents should be thought material on the trial of a cause. The rule granted therefore in that case was, to shew cause why *copies* of those entries in the transfer books which the party meant to make use of, relative to the matter in dispute, should not be taken, and *read in evidence* at the trial; the rule to be served both on the solicitor for the Company, and the opposite party.

4. Inst. 23.

As to the journals, Sir EDW. COKE says, "the journals of the house of commons are records. The book of the clerk of the house of commons is a record, as it is affirmed by act of parliament, 6. H. 8. c. 16." The words of the act to which he refers are, "except the same be entered of record in the book of the clerk of the parliament, appointed; or to be appointed, for the commons house:" which perhaps may not legally warrant the conclusion (when the act itself is considered) that the journals *therefore* are records. But that the clerk's book means the journals, is evident from several old entries *Journ. H. Cam.* 25th Feb. 1623-4. vol. 1. p. 673. col. 1st Mar. 1623-4. ib. 675. col. 1. 12th Mar. 1623. ib. 689. col. 2. However disputable heretofore, it may now be stated, that *sworn copies* of the journals of parliament are evidence; for *such* were produced and read in evidence (and that in a case of high treason), in the *King v. Lord*

Georg

George Gordon, on the part of the crown, without being
 objected to. Doug. 8vo. 2.v. 593. Cowp. 17.

In the ordinary case of tenancy from year to year, subject to the usual notice to quit, that notice, if the ejectment be founded on it, must be proved by the person who delivered it; producing at the same time, a copy which must also be *verified* of the notice. Upon whom and where it may be served, and what may be *presumptive* evidence of the receipt of it, see the case of *Griffiths v. Antz*, 111. *Morsh*. And if it be necessary, in such, or any other case, to prove payment of rent by the tenant in possession, it is usual to give him notice to produce his receipts at the trial; which if he does not, *parol* evidence will be received to substantiate the payment. But if the fact can be proved without receipts, no legal necessity can exist, of notice to produce them. And though an entry made by a third person, deceased, in his books, of receipts of rent from his tenant for a particular estate, may be evidence of that 5.T.Rep.121. circumstance; yet it cannot be of any thing more. It cannot be permitted to decide a question of *right* between others. Thus, in *Optram v. Morewood*, it became material to identify a close (called the *Cow Close*) to be part of certain lands which had been the estate of Sir J. Zouch, and out of which certain rents and coals had been reserved. This was attempted to be done, by tracing the lands through the possession of several persons claiming under the Zouch family; by shewing that the close had been in their possession, and that the same rent was paid, as had been paid for it by the owners of the land to the persons claiming under Zouch, during all that time; from whence it would follow, as was contended, that it was part of the lands of Zouch, out of which the coals also were reserved, which was the only thing in question. To substantiate v. *Lor*, a deed of 1708 was produced (which referred to a former

former conveyance from the *Zouch* family), to shew that a rent of 39s. (the same which was paid for the *Cow Close*) had been payable out of lands, part of the *Zouch* estate, in the possession of one *Adyn*, who was tenant to one *Machell*, the then owner of the inheritance; and that *Adyn* was in possession of the *Cow Close* alone within eight years after the deed of 1708. Then was produced, in order to fill up a chasm of time, the evidence upon which the principal question arose; which were entries in certain books made by *Rowland Morewood*, in which he acknowledged the receipt of the same rent for several years from *Machell*, owner of the *Cow Close*, under whom the plaintiff derived title. It was proved by living witnesses, that the rent of 39s. was continued to be paid, by persons claiming under *Machell*. But the question was, whether the entries made by a person, from whom the defendant claimed the rent, though *not* the coals, ought to be received in evidence for the purpose of proving the identity of the land, in order to establish his right to the coals also? The Judge admitted the evidence, expressing some doubt as to its legality. And there being a verdict for the defendant, a rule *nisi* was obtained for setting it aside, and granting a new trial, on the ground that the evidence had been improperly admitted.

LORD KENYON. The book stands in the same situation, and is entitled to the same credit, as a declaration of *Rowland Morewood*; but I cannot agree, that such a declaration could have affected the rights of the parties. All evidence (except in particular cases) must be given on oath; but this is merely the declaration of a person not on oath. And although a general right may be proved by *traditionary* evidence, yet a particular fact cannot. What a party did or said may be evidence against himself. But the *cross* made by *Rowland Morewood*, in

book; was a mere private memorandum, to remind him that he had received the rent; and cannot be admitted to decide the *rights* between these parties. At that time *Rowland Morewood* had no interest in this question. Besides, evidence of this kind can only be admitted to restrain, not to advance, the right of the party who makes it. What a man does in his closet, ought not to affect the rights of third persons: there is only one instance in which this is allowed; namely, *the books of an incumbent* respecting his tithes, which may be evidence for his successor. But that has always been considered as an *excepted case*.

BULLER, J. I agree, that the entry in *Rowland Morewood's* book, must be considered in the same light as a declaration by him. But evidence *not* on oath is not admissible, except in the case of pedigrees, and certain other excepted cases; or where the declaration is evidence against the party making it.

GROSE, J. As the evidence of a declaration by *Rowland Morewood* would not have been admissible, I think the cross in his book is not, it being nothing more than a declaration. Nor can this be received in evidence on the ground of tradition; because the tradition of a particular fact is not evidence. I am therefore of opinion, that this book should not have been received in evidence; consequently that there should be a new trial.—Rule absolute.

THE ejectment being a possessory remedy, and only a *Burr. 1194* competent where the lessor of the plaintiff may enter, it is always necessary for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, in the lessor of the plaintiff or his ancestors: or by accounting

accounting for the want of it, under some of the exceptions allowed by the statute of Limitations. But a lease under a power, made unfairly, in prejudice of those in remainder, and which was found in the custody of the maker, at his death, amongst his own muniments, was not deemed sufficient evidence of possession; for a surrender of such lease might and ought to be presumed at the trial, to let in the statute. And in that case (*Atkyns v. Horde*), judgment was given by the court of king's bench for the plaintiff on the right, but against him upon the remedy; the court being of opinion, that he was barred by the statute of Limitations. A writ of error was brought by the plaintiff, in the house of lords, who determined on the latter point first and separately; and holding the plaintiff to have been barred of his remedy affirmed the judgment, without ever entering into the question of right.

L.A. Cullen v. Rich, M. So, in an ejectment for MINES, evidence of being lord of a manor, is not sufficient proof of possession; it being necessary to shew an actual possession. For the same reason, a verdict in trover for lead dug out of a mine will not prove possession of the mine; for that action may be brought by him who has the property only without the possession.

And though the defendant confess lease, entry, and ouster, yet, some have said, he may deny being in possession of the premises for which the plaintiff contends, and put him to prove it; which if he cannot, he must be nonsuited. So, in the case of *Smith v. Mann*, where the landlord had been made defendant instead of his tenant, it was decided that the plaintiff must prove the tenant's possession; for the defendant does not, by entering in the rule, confess himself to be landlord of any premises.

but of such as were in possession of his tenant. These positions may be disputable, unless in cases where there were several tenants; for it has been said, that *Jesse v. Baccus*, M. 30. G. 2. if there be but one tenant defendant, the plaintiff need not prove him in possession; because, if he be not, *sittings B. R.* why did he enter into the rule?

WHERE the lessor of the plaintiff claims as DEVISEE *Str. 70.* of a term, he must prove the assent of the executor to the devise; but where he claims as devisee of a FREEHOLD, *Co. Lit. 240.* it is not necessary to prove possession; for the law casts the freehold on the devisee; and though the heir may have entered before him and died, yet that will not bar his entry. As to *personal estate*, the law of *England* has adopted the rules of the *Roman testament*, but a *devise of lands in England* is considered in a different light from a *Roman will*; for a will, in the civil law, was an institution of the heir; a *devise in England* is an appointment of particular lands to a particular *devisee*, and *Cowp. 90.* is considered in the nature of a conveyance, by way of *305.* appointment. Upon which principle it is, no man can devise lands which he has *not* at the date of such conveyance. It does not turn upon the construction of the statute of Wills, which says, that "any person *having* *27. H. 8. c. 10.* lands may devise:" for the same rule held before, *34. & 35. H. 8,* where lands were deviseable by custom. *c. 5. 32. H. 8. c. 11*

THOUGH many titles are derived under wills, yet it cannot be expected that this Treatise should notice the rules which have been established either for their construction, republication, or revocation: all illustration upon those points is there necessarily forborne. By the statute of Frauds, *29. Car. 2. c. 5, 6.* it is enacted, "that all devises and bequests of any lands or tenements, deviseable either by force of the statute of Wills, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or

" any other particular custom, shall be in writing, and
 " signed by the party so devising the same, or by some
 " other person in his presence, and by his express direc-
 " tions, and shall be attested and subscribed in the pre-
 " sence of the devisor, by three or four *credible* witnesses,
 " or else they shall be utterly void, and of none effect.
 f. 6. " And moreover, no devise in writing of lands, tenements,
 " or hereditaments, nor any clause thereof, shall be *revoc-*
 " *able*, otherwise than by some other will or codicil in
 " writing, or other writing declaring the same, or by
 " burning, cancelling, tearing, or obliterating the same
 " by the testator himself, or in his presence, and by his
 " direction and consent; but all devises and bequests of
 " lands and tenements shall remain and continue in force,
 " until the same be burnt, cancelled, torn, or obliterated,
 " by the testator or his directions, in manner aforesaid,
 " or unless the same be altered by some other will or
 " codicil in writing, or other writing of the devisor
 " signed in the presence of three or four witnesses, de-
 Rol. Abr. 678. claring the same." Hence, if a man devise lands by
 Theo. Evid. force of the statute of Wills, or by custom, THE PROBATE
 40: of the will in the spiritual court cannot be given in evi-
 dence; all their proceedings, so far as they relate to lands
 being *coram non judice*; inasmuch as they have not power to
 authenticate a devise. A copy therefore, produced under
 Id. 41. their seal, is no evidence in ejectment, though it be only
 to prove the relation of father and son, by the father's
 will. For where the original is in being, the copy is
 no evidence, and the probate is no more than a copy
 under seal of the court. Thus in *Dike v. Polhill*
 1. L. L. Raym. the copy of the register of a will was produced in evi-
 744: dence, to prove a pedigree, but not to derive any title
 under the will; the probate of the will was also offered
 for the same purpose. HOLT, Ch. J. refused to admit
 them. For, 1. as to the probate, it is only evidence of

will as to *chattels*. 2. He said, that though there was the same reason to admit the copy of the register to be evidence, as the copy of court rolls, or of a register of a church, yet the practice had been uniformly otherwise; which he would not subvert: and the copy of the register, not being evidence to prove the will, it could not prove the pedigree, because *that* depends upon the credit of it being a will, which is not proved by a copy of the register; the evidence, therefore, was not admitted by him. But afterwards, in an issue directed out of chancery, to try "heir or not," the same probate was offered to Baron Tracy, to prove the pedigree; who admitted it, notwithstanding the other case was cited to have been ruled, as before stated; because, as he said, the other cause was an ejectment, and this only *in case*; and he could not know that the title of the land would come in question, &c. But it seems to me (adds the Reporter), that there is no difference, because the title of the land was not derived under the will, in the ejectment.

THE practice may have been founded on a mistaken notion, that the register is read as a copy, that therefore the copy of it is but the copy of a copy, whereas, in truth, it is read as a roll of the prerogative court. But where a will remains in *chancery*, by order of the court, Keb. 40: 117. a copy of it may be given in evidence; for then it becomes a roll of that court, consequently a copy of it is good evidence.

WHEN the original will is produced, which it must be, in the case of a devise, within the statute of Frauds, the usual way is to call but one witness to prove it; but that is only, when no objection is made by the heir: and though he be intitled to have them all examined, yet he must produce them; for the devisee need only produce

one, if that one can prove all that is requisite. And though all the witnesses should swear that the will was not duly executed, yet the devisee may go into circumstances, to prove the due execution. As was the case of *Austin v. Willes*, in which, notwithstanding all the witnesses swore that the will was not duly executed, the devisee obtained a verdict. In *Townsend v. Ives* (at the Rolls, May 9, 1748); a bill was preferred by the legatees under the will of *John Townsend*, in order to have his real estate sold for payment of their legacies, which were charged thereon, against the heir at law of the testator, who was an infant, and to have the will established. There were three witnesses to the will, all living, but only one had been examined, who proved the execution of it, and the attestation of the other two witnesses. But his Honour refused to establish the will without the examination of *all* the witnesses: for it is a rule (added his Honour) that all the witnesses, if living, must be examined to prove the will: besides, the heir at law is, in this case, an infant, who, if of age, has a right to cross-examine all the witnesses; and as no admission of this sort can be received for an infant, this court must protect his rights, and therefore must insist upon all those requisites which he would have a right to insist upon were he of age, and capable of making a defence for himself."

AND though a will may be read, on proof of all the circumstances by *one* witness, yet that proceeds on the idea, that there are two others who could give the same testimony.

HERE it becomes necessary to advert to the situation of those who, in pursuance of the statute of Frauds, are called upon to attest so solemn an instrument as a will. They must, it has been said, be *credible*, and that at the time of

Cited by Lord
Hardwicke in
Blacket v. We-
rrington, M.
11. Geo. 2.
Stra. 1096.

4. Will. 216.

9. Stra. 1254.

Id. 1255.

attest-

attestation. And (*East. 19. Geo. 2.*) it was formally determined, that if one of them had an *interest* under the will, he was not a *credible* witness, within the statute 29. *Car. 2. c. 3.* and that even the will itself was void: which was decided in *Anstey v. Dowling*. That decision probably *Id. 1253.* gave rise to 25. *Geo. 2. c. 6.*; which (after stating in its preamble, that doubts had arisen who were to be deemed legal witnesses, within the intent of 29. *Car. 2. c. 3. f. 5.*—for avoiding the same), enacts, that “if any person shall attest the execution of any will or codicil which shall be made after the 24th of *June 1752*, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, &c. shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, notwithstanding such devise, &c. mentioned in such will or codicil. And that in case by any will or codicil already made or thereafter to be made, any *f. 1.* lands, tenements, or hereditaments, are or shall be charged with any debt or debts; and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil. And that if any person hath attested the execution of any *f. 3.* will or codicil already made, or shall attest the execution of any will or codicil which shall be made on or before the 24th of *June 1752*, to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person,

f. 4.

L. 5.

f. 6.

" person, before he shall give his testimony concerning
 " the execution of any such will or codicil, shall have
 " been paid, or have accepted or released, or shall have
 " refused to accept such legacy or bequest upon tender
 " made thereof, such person shall be admitted as a witness
 " to the execution of such will or codicil, notwithstanding
 " such legacy or bequest. Provided, that in case of
 " such tender and refusal, such person shall in no
 " wise be intitled to such legacy or bequest, but shall be
 " for ever afterwards barred therefrom; and in case
 " of such acceptance, such person shall retain to his
 " own use, the legacy or bequest which shall have been
 " so paid, satisfied, or accepted, notwithstanding such
 " will or codicil shall afterwards be adjudged or deter-
 " mined to be void, for want of due execution, or
 " for any other cause or defect whatsoever. And that
 " in case any such legatee, *who hath attested* the exe-
 " cution of any will or codicil already made, or shall
 " attest the execution of any will or codicil which shall
 " be made on or before the said twenty-fourth of June
 " 1752, shall have died in the life time of the tes-
 " tator, or before he shall have received or released the
 " legacy or bequest so given to him, and before he shall
 " have refused to receive such legacy or bequest, on
 " tender made thereof, such legatee shall be deemed a
 " legal witness to the execution of such will or codicil,
 " notwithstanding such legacy or bequest. Provided,
 " that the credit of every such witness so attesting the
 " execution of any will or codicil, in any of the cases in
 " this act before-mentioned, and all circumstances rela-
 " ting thereto, shall be subject to the consideration and
 " determination of the court and jury, before whom
 " any such witness shall be examined, or his testimony
 " or attestation made use of; or of the court of equity,
 " in which the testimony or attestation of any such wit-

" ne

ness shall be made use of; in like manner, to all intents and purposes, as the credit of witnesses, in all other cases ought to be considered of and determined. And that no person to whom any beneficial estate, interest, gift, or appointment, shall be given or made, which is hereby enacted to be null and void, or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of or receive any profits or benefit of or from any such estate, interest, gift, or appointment, so given or made to him, in or by any such will or codicil, or demand, receive, or accept from any person or persons whatsoever, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever." c. 7.

AND in *Mackender v. Mackender*, it appeared that one of the subscribing witnesses to the will, before the time of his attestation, had been indicted, tried, and convicted of stealing a sheep; was found guilty to the value of *ten-pence*, and had judgment to be whipped. The question was, whether he was a *competent* witness, within the statute of Frauds and Perjuries. After three arguments, the court of *C. B.* was clearly of opinion, that he was *not*—judgment for the plaintiff, who claimed as heir at law. 2. Wils. 14.

Of the authority of which case, considerable doubt may be entertained; particularly, when some of the reasons urged in the following one, are attentively considered.

At a subsequent period, namely, *Mich. 31. Geo. 2.* the doctrine alluded to was accurately investigated and deliberately

1. Burr. 414.
2. Black. 95.

berately considered, by the late Lord MANSFIELD, in the case of *Windham v. Gbetwynd*. In the luminous and elaborate decision which that venerable and illustrious Judge gave in that case, it should seem that not only the judgment in *Anstey v. Dowling*, was founded on the particular circumstances of that case; (as there was not, nor could have been any payment or tender of the annuity given by the will, in that case, to the wife of the witness;) but even the general doctrine was denied. The determination in *Windham v. Gbetwynd* was in 1757, some time after passing 25. Geo. 2. c. 6. but on a will made previous, namely, 14th May 1750.—“Suppose” (said his Lordship in that case) “the witnesses honest, how little need they know? They do not know the contents; they need not be together; they need not see the testator sign (for if he acknowledges his hand it is sufficient); they need not know it to be a will; for, if delivered as a deed, it is valid. For these and many more reasons, Judges should lean against objections to the formality. At the time the statute of Frauds was made, the law rejected no witness to prove a will; unless, at the time of examination, his testimony tended to support his own title, and enabled him to hold or recover an interest under it; but if there was a

3. Burr. 421.

release, payment, or tender, he was a witness. Before the statute, no one could intitle himself, by his own examination, to a devise; nor since, by virtue of his own subscription, which, at the time of subscribing, he could not have proved by his examination. The question does not depend on the construction of any words of the statute. The statute is silent as to the capacity of the witnesses: it declares no incapacity; requires no qualification. The epithet “credible” has a clear precise meaning. It is not a term of art appropriated only to legal notions; but has a signification universally received; and is never used as synonymous to competent. When applied to testimony, it

pre-

presupposes the evidence given. *After* the competence of a witness is allowed, the consideration of his credibility arises; not before. Persons undoubtedly *credible* cannot be witnesses *under particular circumstances*: and persons manifestly *incredible* may be, and often *are* witnesses. In acts of parliament, which direct convictions upon oaths of witnesses, the epithet "*credible*" is added; but by no means intended to signify "*competent*;"—that is implied in the term "*witness*." But it is intended (from abundant caution) to declare, that though competent witnesses swear positively, their *credibility* is to be weighed: and if the magistrate thinks the evidence not credible, he ought not to convict. In this sense, it was unnecessary to add the epithet *here* to subscribing witnesses. And yet, to make the essential solemnity of the will depend upon the credibility of subscribing witnesses, is so absurd, that their *credibility* has always been held to make no part of the necessary form. If they all swear the testator did not execute—if they had, at the time, the worst characters, and had committed the most infamous actions, yet their attestation answers the necessary form; because the testator meant to comply with the law, and might not know them to be bad men. In a clause, not the most accurate, I can easily believe that the usual epithet "*credible*" slipped in, as of course, without attention to the impropriety of using it on this occasion. But what sense soever is put upon the word "*credible*," the statute leaves the question just as it was; for it does not declare, who are or are not credible; or, (if it be supposed to mean competent) who are competent or incompetent. The time of *examination* could not possibly be the criterion upon which the validity of the will was to depend. The witnesses might not live to be examined; and their incompetence to be examined, might arise long after their attestation. The presumption of bias arises, *as at the time of subscribing*;
but

but may be answered. If part is devised to a subscribing witness, the presumption is answered, by shewing he was heir at law; that the devise is void; or that he has renounced it. Where is the reason to say, that a witness who does not know the contents of a will during the testator's life, and at his death takes no benefit, was biased at the time he subscribed, or can be biased at the time of examination? During the life of a testator, devises are mere possibilities: no interest can vest till death. The presumption of bias from possibility is answered by the fact when it becomes an interest. His swearing when he is totally disinterested, is conclusive, that the possibility is not to be presumed the corrupt clause of his subscribing. It is natural and usual to give legacies to servants, and tokens to friends. Persons under these descriptions are most like to be witnesses. Ought such trifles to overturn, unavoidably, the most deliberate dispositions of the greatest estates? which may be attended often with this family distress, that a man may have given his money to one part of his family, and his land to another: in which case, the will would be good as to the money, and void as to the land. If the Legislature had said so, that would have been a positive rule: but it is contended for, by construction only. Neither reason nor policy requires the objection to be carried farther than I have laid it down, agreeable to the law before the statute, and the universal maxim, "*testis in propria causa non est adhibendus*." In many instances, the presumption of bias from a legacy, at the time of subscribing, has been allowed to be taken off by a *release*. Authorities have been cited, to shew this was "considered as a settled point:" and I verily believe it was so, from the authority of the oldest and most eminent practitioners in *Westminster Hall*; and therefore I give credit to the *dictum* of Powys in *Viner*, that it had been solemnly agreed by the Judges, that

where

where a person had a legacy given, and did release it, he was a good witness to prove the will. Before the case of *Anstey v. Dowling*, a will of a very great estate was liable to the objection; and the heir at law would have contested it. But as it was certain the witnesses would be paid or released, no opinion that he took, encouraged him to think it worth his while. Indeed, the number of wills where the objection lay, and never was taken, demonstrate it. There is not a single determination which carries the incapacity further than the rule I have laid down, viz. "that a person shall not, in a court of justice, intitle himself to a devise, by virtue of his own subscription, which at the time of subscribing he could not have proved by his examination." I think a charge to pay debts, ought not to incapacitate subscribing witnesses; although they wanted and claimed the benefit of it. Every honest man should make that charge in his will: he who omits it, is said to sin in his grave. The persons attendant on a dying testator, and therefore most commonly witnesses, are generally in some degree creditors; such as servants, parson, attorney, apothecary, &c. and disallowing such persons to be witnesses, cannot answer the ends of public utility."

As to releasing the interest, see before, pa. 251, 2. But a will sufficient to pass *personal* property, not attested according to the statute of Frauds, is a sufficient will to direct the use of a copyhold: for as to *copyhold*, a will is, in general, said to be considered only as an *appointment*; and that there need not be three witnesses to it: it is certainly neither within the statute *de Donis*, or that of Uses.

WITNESSES to wills are sometimes open to temptation, and liable to be tampered with; they should not, therefore, be permitted to give evidence against their attestations. In *Alexander v. Clayton*, a verdict was found for the plaintiff: "tiff:

tiff: on a motion to set it aside, it appeared that an attesting witness to a will had sworn against her own attestation.—YATES, J. In the present case, I think the witness ought *not* to have been admitted to give evidence against her attestation. There are cases where *one* witness has supported a will, by swearing that the other two attested; though the other two have denied it.—LORD MANSFIELD. I have several cases, both upon bonds and wills, where the attestation of witnesses has been supported by the evidence of others, against that of the attesting witnesses themselves, who denied their own attestation. It is of terrible consequence, that witnesses to wills should be tampered with, to deny their own attestation.—Rule absolute.

So, if the subscribing witnesses to a will testify to the *insanity* of the testator, they may be contradicted by other evidence. Thus, in *Lowe v. Jolliffe*, on a trial at bar on an issue out of chancery, *devisavit vel non*, concerning lands in Worcestershire; the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent to the will, and several tenants of the testator, all swore him to be utterly incapable of making a will, or transacting any other business at the time of making the supposed will and codicil, or at any intermediate time. To encounter this evidence, the counsel for the plaintiff examined several of the nobility and principal gentry of the county of Worcester; who frequently and familiarly conversed with *Mr. Jolliffe* the testator, during that whole period, and some on the day whereon the will was made; also two eminent physicians, who occasionally attended him; who all strongly deposed to his entire sanity, and more than ordinary intellectual vigour. They also read the deposition of the attorney who drew and witnessed the codicil; who was dead, but his

2. Bacc. 355.

his testimony perpetuated in chancery; who spoke circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct, in directing the contents of his codicil. They also offered to examine *Mr. Rupert Dovey*, an attorney of unblemished reputation, who drew the will; whereby he and another were made executors *in trust*, to sell part of the estate for payment of debts, with a legacy of 200l. each, for their trouble. Before the will was contested, *Dovey* had so far acted in the trust, that he had contracted for, and actually sold, *Mr. Jolliffe's* chambers in the Temple, to *Mr. Gaigne Frederick*; but in order to be a witness of *Mr. Jolliffe's* sanity, had voluntarily released his legacy. The counsel for the defendant still objected to his competency; first, as being an executor *in trust*, and so liable to actions: secondly, as having acted under the trust; whereby if the will was set aside, he became liable to answer *Mr. Frederick* for the damage sustained by an illegal sale of the chambers.

—LORD MANSFIELD. In a modern case of *Holt v. 1. Barnard, B. R. 12.*
Tyrel, it was held in a trial at bar, that a trustee might be a witness without releasing; and where is the difference between an executor *in trust* and another trustee? His being liable to actions makes no difference; for so are all agents, and yet they are allowed to be witnesses.—WIL- *Ants, 251,*
 LOR, J. I remember another trial at bar, wherein it was held, that a devisee *in trust* might be a witness. And no distinction was taken between his acting, or not.—*Mr. Dovey* was accordingly sworn; and, upon the whole, it appeared to be a very black conspiracy to set aside the will, without any foundation whatever. The jury found a verdict for the plaintiff, establishing the validity of the will and codicil. The three testamentary witnesses were afterwards convicted of perjury.

An executor may prove the sanity of his testator. *402, 251*

Doug. 8vo,
241.

IF however the testator be in a state of *insensibility* when the will is attested, the will is not duly executed, according to the meaning of the statute of Frauds, even though he be *corporally* present; as in *Cater v. Price*.—LORD MANSFIELD. The court, to be sure, would lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute has been complied with. But *this* is not a measuring cast, where there is room for presumption. All the witnesses knew, at the time of attestation, that the testator was *insensible*. He was a log, totally absent to all mental purposes. It was no sudden *delirium*, or suspension of the understanding. In such a case perhaps, the court would lay hold of a very slight presumption. Another thing, it is usual in precedents of wills to say, that the witnesses subscribed *at the request* of the testator. That indeed is not expressly required by the statute, but the practice shews the general understanding and the nature of the thing implies a request.—BULLER, J. The attestation in the testator's *presence* is as essential as his signature, and all must be done while he is in a capacity to dispose of his property. Here the trunk remained but the man was gone. He could not know, whether the will which he had begun to sign, was that which the witnesses attested. He was dead to all purposes or power of conveying his property. As to the *signing* of the testator it has never been, nor can be dispensed with. The courts have only had occasion to decide, in different cases, what shall be a signing within the true meaning of the statute.

THE statute of Frauds is supposed to have been made on great consideration; but on attentive perusal, it does not appear to have been accurately penned. It is universally understood to be the meaning of the statute, that the testator must sign *in the presence of the subscribing witnesses*.

1g. 242.

yet there is no express provision for that purpose in the clause (f. 5.) describing the solemnities which are to attend the execution. It is as universally understood, that an express written *revocation* must be executed with the same solemnities as an original will; but in the clause (f. 6.) relative to such revocations, the subscription of witnesses is not directed; while, on the other hand, the signing by the testator in their presence is, in such case, expressly prescribed. See the case of *Grayson v. Atkinson*, where LORD HARDWICKE determined, that it is not necessary, in the case of a will, that the testator should sign in presence of the witnesses; but that it is sufficient if he acknowledge his hand-writing to them all, though at different times. And in *Ellis v. Smith*, Canc. H. & M. 27. Geo. 2. LORD HARDWICKE, assisted by WILLES, Ch. J. STRANGE, Master of the Rolls, and the Chief Baron, decided, that a will attested by three witnesses, in the presence of the testator, and acknowledged by him in their presence to have been signed and sealed by him, but not signed in their presence, was a good revocation of a former will, under (f. 6.) of the statute of Frauds.

2. Ve2. 454.
3. Mod. 218.
1. Show. 68,
69.
3. P. Wms.
251.

THE following case (*Revett v. Braham*) is remarkable, 4. T. Rep. 497.

For the evidence which was adduced to prove that the will, under which the defendant claimed, had been forged. It was an ejectment tried at bar. The lessor of the plaintiff claimed as heir at law; the defendant, as devisee of the person last seised. The plaintiff stated his pedigree, which was admitted; the defendant proved the will, which was impeached on various grounds, but chiefly on that of forgery. There were two parts of the will; to each of which were three signatures and a seal: with one of which was sealed up a paper, purporting to be instructions for the will, in the hand-writing of the testatrix, signed and sealed by her; at the bottom of which was a

THE LEGAL REMEDY

memorandum, that the testatrix, at the time of executing the will, requested the attesting witnesses to sign the paper for her, which she declared to be her writing; and they had signed it accordingly. This *memorandum* was in the hand of one *Reilly*, who was supposed by the plaintiff to be the contriver of the will, and who was considerably benefited by it. The plaintiff's case, as to the forgery, consisted of evidence that the testatrix was incapable of writing a paper of such length as the instructions, and hardly able to sign her name; of declarations in her lifetime, that she never would make any will; and of formal contradictions by the attesting witnesses. The plaintiff then called two *clerks* of the *Post-office*, who swore that they were used to inspect franks and detect forgeries. They were asked, whether, from their general knowledge of writing, the instructions were a natural or an imitated hand? The question was objected to, but allowed by the court; and the clerks swore that the hand was imitated. They were then asked, if they could judge whether the instructions were written by the person who wrote the *memorandum*; which was also objected to, being a comparison of hands; but allowed by the court. LORD KENYON, Ch. J. mentioned a case where a cypherer had given evidence of the meaning of letters without explaining the ground of his art, and where a prisoner was convicted and executed.—BULLER, J. said it was like the case of *Wells Harbour*, where persons of skill were allowed to give evidence of opinion. The clerks then swore, that from their knowledge of the similarity of hands, they were sure the instructions and *memorandum* were written by the same person. They swore, that all the signatures to the will, and the signature to the power of attorney to surrender copyholds to use of the will executed afterwards, were imitated and not natural writing. On cross examination, they admitted

that they had never detected an imitation of the hand of a very old person, who wrote with difficulty, and might be supposed frequently to stop. That their principal means of knowing, was, by seeing whether the letters were painted, that is, gone over a second time with the pen, which they admitted, might happen to any person from failure of ink. Other signatures of the testatrix, proved by unsuspected persons, were then shewn to these witnesses; one of the signatures was sworn to be genuine by one of them, and by the other to be imitated.—LORD KENYON, in summing up to the jury, left the question of forgery on the evidence which they had heard, without any observations. The jury found for the plaintiff.

AND if it be necessary to admit *parol* evidence, as for instance, to identify the object of a testator's bounty, it may of course be resisted by evidence of a similar description. Thus in *Jones v. Newman*, a motion was made for a new trial, in ejectment, wherein the lessor of the plaintiff was heir at law, and the defendant's title arose upon a will, which devised the premises to *John Cluer of Calcot*, under whom the defendant claimed. But the plaintiff gave evidence, that at the time of making the will, there were two *John Cluers, father and son*; and that therefore the devise was to the father, who died before the testatrix, and the devise lapsed. Upon which, the defendant offered to prove, by *parol* evidence, that the testatrix intended to leave it to *John Cluer* the son; but the Judge would not suffer it, and a verdict was found for the plaintiff.—But per TOTAM CURIAM, the Judge was mistaken. The objection arose from *parol* evidence, and ought to have been encountered by the same: so granted a new trial. So, where a will was silent as to the disposition of the residue of *personal* property, *parol* evidence (of the propriety

See 1. P.
Wms. 9. ed.
3793. and
2. Vez. 28.
3. Will. 313.

priety of which some doubt may be entertained) was received of the testator's *intention*. That was the case of *Lake v. Lake*, in chancery.—A bill was preferred by the testator's next of kin against his widow, who was his executrix, to have a distributive share of the personal estate undisposed of: the testator having given her by his will a legacy of 1400*l.* upon condition she did not suffer a bond (which he gave upon his marriage with her to leave 400*l.* to such children as they should have) to affect the assets, and they never had any children: he also left her an estate in land. The widow executrix insisted she was intitled to the residue, notwithstanding the legacy and the devise of lands to her; for that the testator had frequently declared his intention, that she should have the residue, and that she had in proof. For the plaintiff, it was objected, that the testator's *parol* declarations ought not to be admitted. The evidence was, that the witness in travelling with the testator, who was not very well in health and talking of serious things; the testator said, he had done very handsomely for his wife, and very well for his sister and brother; and said, that after his debts and legacies were paid, he hoped there would be something very handsome for her besides; that he had given his wife half of his money in a sum certain; and if she had good luck in getting in his debts, there would be something more, which would be all her own.—**LORD CHANCELLOR.** If making a wife executor, should of itself allowed a good reason why she should have the residue, when she has a considerable legacy, we shall not know where to stop; but where a wife is executor, and great affection is proved to have been between them, as here, is very *reasonable* to admit this kind of *parol* proof; at less evidence than this would have turned the scale in her favour: therefore the bill must be dismissed;

If the plaintiff make title under the ASSIGNMENT OF A TERM, by an administrator, and cannot produce the letters of administration, the book of the ecclesiastical court, where the order of court for granting them was entered, is evidence; or a copy of that book will be sufficient. But the administrator cannot be permitted to give such a book, or a copy of it, in evidence, until he previously prove that the administration, under the seal of the court, is lost. And on a title to *personal* property, under the will of a *feme covert*, to whom the power of making a will is reserved, the will must be proved at the Commons, before the claimant can resort either to a court of equity or law: and if the ecclesiastical court will not grant probate, the proper course is to appeal to the delegates.

WHERE the lessor claims AS HEIR at law, as, for instance, of A.—it is sufficient to prove that A. was in possession, and that the lessor is his heir; for it shall be intended, *prima facie*, that A. was seised in fee, till the contrary appear. Lands in fee-simple must nevertheless descend to the heir of the *whole* blood of the person last actually seised thereof. This is a maxim of the law of England which has subsisted for ages. And although it sometimes operates hardly against children of the *half* blood of the person last actually seised, yet the law must be taken as it is, and courts must determine accordingly. Hence, in the case of *Newman v. Newman*, the court determined, that where lands descended to two daughters of the father by the *first* venter, and, after his death, an infant son was born of a second venter, (the mother at that time residing in part of the premises, and receiving rent for the other parts, both before and after the birth of her son; the son died at the age of five weeks and three days;) was a sufficient actual seisin in the infant son, to make a *possession fructus*; so that the lands should not descend

descend from him to his sisters of the half blood, but to a more remote heir of the whole blood.

4. T. Rep. 309. So the son of an *alien* father and *English* mother, born out of the king's allegiance, cannot inherit to his mother in this country.

WHOEVER therefore claims as heir in fee by descent, must make himself heir to him who was last seised of the actual freehold and inheritance: that is, who was last ACTUALLY in possession of the lands in fee-simple; and if he claim as heir male, by purchase, he must be both heir and male; for he, who will take as heir male, must convey his descent through all males, so that the son of a daughter cannot take. The cases upon this point are cited, and the exceptions stated and explained, in the case of

1. Wils. 30. *Gwynne v. Hoake*. But if the legal interest in land descend in fee-simple, *ex parte maternâ*, and the equitable interest in fee-simple, *ex parte paternâ*, or *vice versâ*, the equitable estate will merge in the legal, and both follow the line through which the legal estate descends. An heir is a

3. Wils. 418. great favourite with the law; insomuch that it is an established rule, that, in a will, there must be express words, Doug. 763. or a necessary implication, to disinherit him, Cowp. 31. 302. 661.

2. Blac. 1099. In the case of *Thorne v. Lord*, it became a question whether one claiming title as heir, be bound to deduce any pedigree in proof of his descent. It was an ejectment as heir at law to *Thomas James Selby*, who died A. D. 1768, possessed of a considerable real and personal estate; the bulk of which, by will dated 18th of August 1768, he devised to his right and lawful heir at law; for the better finding of whom he directed advertisements to be published in some of the public papers, immediately after his decease; and charged the estates with his debts,

legacies

legacies, &c. to be paid by such heir at law within twelve months after his decease. "But if no heir at law was found," he appointed *William Lowndes* to be his lawful heir, on condition he changed his name to *Selby*, and gave him the estate subject to the charge: and devised another estate in *Middlesex* to his executors, in trust to sell, for which estate the ejectment was brought. On the trial, the lessor of the plaintiff gave some slight evidence of a reputed relationship between himself and the testator, and of acknowledgments that the *Thornes* were his heirs at law; but made no deduction of pedigree, nor was able to state how the relation arose, or who was the common ancestor; or whether any ancestor of *Thorne* was brother or sister to any ancestor of *Selby*. The jury found for the plaintiff. A motion was afterwards made for a new trial, as well on the imperfection of the evidence, as upon the principle, that in order to recover an estate by descent, it was necessary to state some pedigree to the jury; and shew how the lessor of the plaintiff claimed to be heir. Else if a mere apprehension of the deceased, that *A.* was his relation, or heir, were sufficient, it might carry the estate, contrary to the rules of descent, to the half blood; to the maternal instead of the paternal line, &c. and would introduce much confusion and perjury. On shewing cause, for the plaintiff, a case was cited, of *Newton v. the Corporation of Leicester and the Attorney-General*, where there was no deduction of pedigree, but the lessor of the plaintiff obtained a verdict, because it was proved that the deceased used to call him *cousin*. And another between *Newton and Newton*, where no common ancestor was shewn; but it was proved, that the deceased and the claimant were descended from two brothers, which *PARKER, Ch. B.* held sufficient. The court took time to consider, but did not agree in opinion concerning the necessity, that a person claiming to be heir, shall state in evidence

At Leicester,
about eight
years before.

At Derby.

evidence a pedigree, either proving the deceased and the claimant to be descended from some common ancestor, or at least from two brothers or sisters (which was allowed to be an immediate descent); or whether vague evidence of heirship, without such deduction, be proper to be left to a jury; but were clear, that the evidence given was insufficient to prove even general kindred to the testator, and therefore made the rule absolute for a new trial. The Judges however, who thought the deduction of descent necessary, held (in their private conferences), that the same which ought to be *pleaded* in real actions, *must* now be given in evidence in ejectment; in order to make out a title by descent. And they relied on Bro. Monmouth. 13. 2. West. Symb. 63. Co. Ent. 596, 597. Dyer 79. Fitzh. Wille 51. Dyer 89. b. Plowd. 425. Dyer 319. Co. Ent. 196. a. Hob. 232. Cro. Car. 192. 1. Jon. 436. 1. Lev. 190. 1. Show. 244. Carth. 126. Salk. 355. 16. Mod. 248.

And in establishing title upon pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew, that *that* person has not been heard of for many years; to put the opposite party upon proof that he still exists; of course it may be left to the jury to presume him dead, and that even without issue. Many persons go to distant countries, and are never heard of more: and what may be done on such a trial, is no injury to that person, or his issue, should he or they afterwards appear, and claim the estate.

WHERE the lessor claims title as CUSTOMARY heir, he must prove himself strictly to be so, *within* the custom for every custom which departs from the course of the common law, must be construed strictly: and if a custom be silent, the common law must regulate it.

course of descent. In the case of *Ratcliffe v. Chapman*, SIR EDWARD COKE says, "there are two pillars of custom; one, the common usage; the other, that it be time out of mind;" and therefore he says, "upon the evidence given to the jury, the court enforced the parties, which maintained the custom, to shew precedents in the court-rolls to prove the usage, and that without such proof, and that it had been put in ure (although it had been deemed and reputed to have been the true custom), yet the court could not give credit to the proof by witnesses." Therefore where the custom is, *Id.* that the eldest sister shall inherit, yet by that custom the eldest aunt or eldest niece cannot. That this is the law in regard to collaterals, is farther proved by the case in 1. *Rol. Abr.* 624. pl. 2. where it is said, that if the custom be that the *youngest son* shall inherit, and a man has issue two sons and dies, and the land descends to the youngest son, who dies without issue, the *eldest son* of the *eldest brother* shall have the land; because the custom does not hold in the transverse line, but only in the lineal descent. Hence it was determined, in *Goodwin v. Spray*, that a custom within a manor, that lands shall descend to the eldest sister, if there be neither a son nor a daughter, does not extend to an eldest niece; but the lands must descend according to the rules of the common law, in default of such son, daughter, and sister. And to prove such to be the course of descent within the manor, a *Customary* of the manor, of great antiquity, though not properly a court-roll, nor signed by any person, but delivered down with the court-rolls, from steward to steward, was deemed good evidence. There no proof at all existed from the court-rolls, as to the course of succession in the collateral line, further than the case of a sister. So, in *Beebe v. Parker*, 5. T. Rep. 46. where the plaintiff claimed under a custom of a manor for the *youngest kinswoman* to inherit, in default of issue, and

and of brothers, sisters, nephews, and nieces, of the person last seized. The plaintiff offered in evidence an entry on the court-rolls of the manor, stating *what the custom was*. It was objected, that such evidence of the custom ought not to be received, until instances had been proved of such mode of descent having taken place. It appeared, that some of the ancient court-rolls were lost; but *no instance* in the court-rolls was produced of any admission beyond sisters; nor was any instance of the youngest kinswoman taking proved by living witnesses. The jury found for the plaintiff. On shewing cause why the verdict should not be set aside, it was admitted, that customs were to be taken strictly, and not extended by implication; but that that rule did not apply so much to the mode of proof, as to the nature and extent of the custom itself, when proved. Thus, a custom for the youngest son to inherit, could not be extended to the youngest brother, &c. But with respect to the mode of proof, the court-rolls of a manor were not only good evidence of the custom, but the *best* evidence; because the highest credit was given to the publicity and authenticity of the records of the manor. Then in either respect it was the same, whether the homage presented what the custom was generally, or whether particular instances were stated by them. That the distinction had always been between a *prescription* for a particular estate, and a custom which extends to other persons. In the former, instances must be adduced, because a man's private deeds and muniments could not be evidence for him against strangers, who claimed by a different title; but it was different in the latter case; where the *lex loci* could as well be collected from the public acts and records of the manor, as from the private acts of individuals; because all claimed from the same source; though undoubtedly the acts of individuals were strong corroborating evidence from their supposed

posed notoriety. If this kind of proof uncontradicted was not sufficient evidence of *itself*, it would scarcely be possible, in cases like the present, *where the rolls were lost*, to prove every particular sort of descent by instances; for living witnesses could scarcely speak from their own knowledge to all of them. That in 12. *Vin. Abr.* title *Evidence*, 215. it is said, that the custom of a manor should be proved out of the books or surveys of the manor, and not by *parol*, which is bad evidence. That the case of a *terrier* being evidence was well established, between which and the present case there was no difference in principle. That the only authority which seemed to bear the other way, was that of *Goodwin v. Spray*; but that would not, on examination, be found inconsistent with the other authorities. The words of the custom there were general, as far as it could be collected, that, "upon the death of a tenant, the bailiff should seize the tenement in the lord's hands, until the next heir should pay the lord so much, *because no tenements of the manor were partible amongst male or female heirs.*" But no evidence was given, that, in point of *fact*, such a mode of descent had ever prevailed beyond the case of sisters: therefore the court held it did not extend to the case of an eldest niece. But it was decisive of the present case, that the court there expressly held, that the *Customary* of the manor was good evidence to prove the mode of descent. If so, it was fully proved here by the court-roll, that the custom did extend to the youngest kinswoman, by the direct finding of the homage. It did not expressly appear in the other case, that the custom did extend to an eldest niece; and therefore that case, so far from contravening, confirmed the principle contended for here. The *Customary* was there held admissible evidence, being stated to be by "*the assent of all the tenants*;" and because it could not be the interest of any of the tenants to fabricate
it,

It. That the same reasons applied with equal force to the reception of court-rolls in the present case. That this custom was found by the homage upon deliberate enquiry, from articles instituted by the lord; and could not be the interest of any person to fabricate it. If then it were once established, that this was admissible evidence for this purpose, however slight it might be, without proof of instances in corroboration, yet being *uncontradicted*, it ought to prevail.—In support of the rule, it was urged, that the finding of the custom by the homage in 1661, *without stating instances in support of it*, amounted only to evidence of *reputation*; and was nothing more than the opinion of persons assembled, concerning what was the custom, reduced to writing. That it had been frequently decided, that reputation, without instances, was not sufficient to prove a custom. The objection therefore was not, that the court-roll could not be received in evidence at all; and therefore the cases cited to prove that it ought, did not apply: but there was another essential ingredient wanting to complete the proof, namely, that the custom so stated by the court-roll, had been put in *writ*. This was expressly laid down by LORD COKE in *Ratcliff v. Chapman*; and recognized and relied upon in the decision of *Goodwin v. Spray*, where the court expressly decided upon the same principle. For it could not be contended that there was any ambiguity in the words of the custom, “*that the tenements of the manor were not partible amongst heirs male or female*.” those words plainly including all heirs male and female: yet because there were no instances of such a descent there stated beyond the case of sisters, although the *Customary* was received in evidence, the court held it was not sufficient of itself to support such a descent to an eldest niece. The resolution of the court then must be taken *secundum subjectam materiam*. As far as the instances supported the custom

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therein stated, the *Customary* was good evidence; but was not sufficient to carry the descent *farther* than such instances. And this distinction was founded, in the first place, on the known rule of law, that *non user* will destroy a custom; therefore it is not sufficient to shew that a custom once had existence, but the party claiming under it must shew, by evidence of such *acts* as the nature of the custom may reasonably be supposed to afford, that it has been continued down to the present time. The distinction was also founded in reason; for where instances are proved of such descents, contrary to the common law, it affords a strong presumption in support of the custom, that if it had not been established, it would have been resisted with effect by those who were interested: whereas in the case of a general finding, where the right of no person in particular was in question, no one was called upon, or even at liberty, to impeach it. There was an additional reason, why, in this case, the *Customary* should not be considered as sufficient evidence of the mode of descent, except in those instances which could otherwise be proved; for the presentment of the homage was the *mere opinion* of those men, founded in part only upon known instances; from which it was fair to infer, that no instances were known to support their opinion on the other parts of it. Besides, the custom was stated inaccurately; for with regard to daughters, it is said they should all take as co-heirs by the custom, which instance did not want the authority of a particular custom, it being the general law of the land; sisters were totally omitted; and then followed the supposed custom relative to kinswomen; so that the custom was not uniform as to all females.

LORD KENYON, Ch. J. The objection which has been made to the evidence, tends to shake one of the funda-

funda-

fundamental rules of law. I admit, that the custom of one manor cannot be extended, by analogy, to another; but the mode of descent, under which a party claims, must be established by proof; and the question here is, whether or not there were any evidence of the custom upon which the claim was founded. The custom is clearly defined in the paper-writing produced from the court-rolls; and without referring to the strict rules of law, let us consider the authenticity of this document on principles of plain common sense. Near a century and an half ago (17th Sept. 1661), the homage (tenants holding under the lord of the manor), being convened together *eo nomine* as the homage, (not for the purpose of extending their claims either against the lord or strangers, but) in order to ascertain those rights which were their own, in common with the rest of the tenants; and being possessed of all that information which either tradition or their own personal observation could furnish, proceeded to describe the several customs which regulated the descent of the different species of tenure within the manor. Now can it be supposed, that those persons, acting under the sanction of an oath, could, for no purpose whatever, give a false representation of these customs? or is it not more probable, that their account was the true one? Common sense and common observation induce us to believe the latter. The argument against the verdict seems to admit that this document was a degree of evidence when produced to the jury: if it were *admissible*, not being opposed by any other species of evidence, and the jury having given credit to it, puts an end to the question. And that this was admissible, cannot be doubted; for tradition and received opinion are the evidence of the *lex loci*. A distinction indeed prevails between a *prescription*, as applied to a particular tenement, and a *custom* affecting the whole district. The latter has gone so far

that the custom of one manor has been given in evidence to shew the custom of another, where they are both governed by the *Border law*. Now here was full proof of tradition respecting the custom of descent in this manor; it was the solemn opinion of twenty-four homagers, who are the constitutional judges of that court, delivered on an occasion when they were discussing the interests of all the tenants of the manor. I cannot distinguish this from the instance of a *terrier*, which is certainly evidence. The case of *Goodwin v. Spray* is distinguishable from the present. Every thing said by the court in giving judgment must be understood *secundum subjectam materiam*. That case first decided, that such an instrument as the present is *admissible*; then the part of it which said lands were not partible, either between males or females, being in general terms, was to be explained by the custom, as it had existed in point of fact; which did not extend to several pieces. If that decision go farther, and determine that such a document is not admissible evidence, unless instances in fact be previously proved to warrant the introduction of it, I dissent from it. In this case, supposing the defendant had demurred to the evidence, the court must have drawn the same conclusion from it which the jury have; therefore, on the law of the case, I think the rule for a new trial should be discharged. GADSDEN, J. I agree, that where a party at *nisi prius* attempts to give *reputation* in evidence, the Judge constantly tells the jury, it does not deserve any credit, unless supported by facts. But it never has been determined, that a court-roll, or a *terrier*, is not, *per se*, admissible evidence, without proving some fact in support of it. If the defendant in this case had tendered a bill of exceptions against the reception of this document, the judgment must have been against him. The dictum of Lord COKE has been

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been cited, to shew that this is not evidence. It must be remembered, that there are considerable inaccuracies in the report of that case; and I think LORD COKE meant to comment on the *credis* which was due to the evidence, rather than on its admissibility. This was considered in *Goodwin v. Spray*; in which it was determined, that the *Customary* was evidence to prove the course of descent. And I think that decision reconcilable with this; for there the words of the custom being general, "*male or female*," it was restrained to such females only as (it was proved) had taken under the custom. The consequences of *not* receiving evidence of this kind would be inconvenient to all tenants of manors; for some of the instances of descent according to this custom, very rarely happen; and if no instance was to happen in the memory of man, and the court-rolls were to be lost, as they were in this case, the custom itself would be entirely destroyed.—Rule discharged.

3. Will. 63.

AND in *Mason v. Mason*, where the plaintiff claimed a youngest nephew and heir, by custom of the manor, the defendant (at the trial) contended, that the custom was that lands descended to the youngest son; and if no son to the youngest brother of the tenant last lawfully seised, and extended no farther. It appeared by the court-rolls of the manor, that a youngest nephew, at a court leet and baron held in 1657, was admitted tenant *as heir*, by the custom; which, with proof that the lessor of the plaintiff was youngest nephew of the person last seised, was all the evidence adduced to sustain the plaintiff's title. For the defendant, it appeared that at a court leet and court baron held in 1692, the jury and homage found, and which was entered on the rolls of the manor, that the custom of descent extended only to the youngest son.

and if no son, to the youngest brother, and no farther. Also, two old witnesses were received, who testified, that they had heard and believed, that the custom went no farther. A verdict was found for the plaintiff. A motion was made for a new trial, suggesting that the verdict was contrary to evidence; and insisting, that the *single* instance of admittance of the nephew in 1657, was not sufficient evidence to support the custom, as contended for by the plaintiff. But the court thought, that the evidence given for the plaintiff was not only legal and admissible, but contradicted the defendant's evidence, in which case the court never grants a new trial. And the Chief Justice said, the admittance of the nephew in 1657 was very material evidence, being done at a court-leet and court-baron, when it certainly would have been controverted, if the jury had not then thought *that* to have been the custom.

AND where the right to the *soil* is in issue, *entries* written by the *steward* of a former owner, from whom title is derived, are *admissible* evidence, provided the steward be dead. Thus, at the trial of *Barry v. Bebbington*, the plaintiff, who derived title under Lord Barrymore, offered in evidence, several *items* contained in a book, in the handwriting of one *Ashley* deceased, who had many years been steward to Lord B. The manuscript was a common day-book, (not particularly appropriated to *Ashley's* concerns with Lord B.—but) containing a variety of other matters relating to his different employers. The *items* in question, three in number, were *memoranda* of receipts of sums of money by *Ashley*, from different persons by name, whose situations were not mentioned, for trespasses committed on the common in question, paid on account of Lord B.—The first *item* was dated in 1739, the last in 1745. The evidence was rejected; and a verdict having

been given for the defendant; a rule was obtained to shew cause why there should not be a new trial, on the authority of *Webb v. Gresham*. — LORD KENTON. We are not called upon to determine, what weight this evidence ought to have: perhaps it may turn out, on farther investigation, that these were small sums paid by persons in poor circumstances to the lord of the manor, with whom they were not in a situation to contend: but the question is, whether the entries be not *admissible* evidence. It is clear, that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury, to shew that such sum was received by him. But it is objected, that the steward's accounts should have been signed by him; but here all the entries were written by the steward himself, and were therefore evidence to charge him with receipt of the money; if so, they should have been received in evidence, though probably they might not have had much weight before the jury. — ASHHURST, J. The rule is, that if a steward's entry be sufficient to charge him, it is *admissible* evidence; and these entries were undoubtedly sufficient to charge him. Suppose Lord B. had brought an action against the steward, for money he had received, he might have given him notice to produce the books in which these entries were made, and they would have charged the steward with receipt of the sums. — Rule absolute.

Cowp. 422.

THOUGH it be true, that if a man devise lands to his right heir *absolutely*, the heir may take by descent, as being the better title; yet if the lands so devised, are subject to a charge, he *must* take under the will, that it may not be defeated.

Those whose *real* interests attached on the *non-existence* of others, were heretofore greatly delayed in legally obtaining

taining possession of their estates; and that, though the lives
 upon which they depended, were at an end; owing to the
 almost insuperable difficulty of proving that circum-
 stance. To redress the inconvenience, it is enacted by
 19. Car. 2. c. 6. §. 3. "that if such person or persons, for
 whose life or lives such estates have been or shall be
 granted, shall remain beyond the seas, or elsewhere ab-
 sent themselves in this realm, by the space of seven years
 together, and no sufficient and evident proof be made
 of the lives of such person or persons respectively, in
 any action commenced for recovery of such tenements,
 by the lessors or reversioners; in every such case, the
 person or persons, upon whose life or lives such estate
 depended, shall be accounted as naturally dead; and in
 every action brought for recovery of the tenements
 by the lessors or reversioners, their heirs or assigns, the
 Judges, before whom such action shall be brought, shall
 direct the jury to give their verdict, as if the person so
 remaining beyond the seas, or otherwise absenting,
 were dead. And that in any such action, wherein the
 life or death of any such person shall come in question,
 between the lessor or reversioner and tenant in posses-
 sion, it shall be lawful for the lessor or reversioner to
 take exception to any of the jurors returned for the
 trial of that cause, that the greatest part of the real es-
 tate of any such jurors is held by lease, or copy, for
 lives; who, upon proof thereof, shall be set aside, as in
 case of other legal challenges. Provided, that if any
 person shall be evicted out of any lands or tenements,
 by virtue of this act, and afterwards, if such person,
 upon whose life such estate or estates depend, shall re-
 turn again from beyond seas, or shall, on proof in any
 action to be brought for recovery of the same, be made
 appear to be living, or to have been living at the time
 of the eviction; then and from thenceforth the tenant

f. 3.

f. 3.

" or lessee, who was ousted of the same, his or their
 " executors, administrators, or assigns, shall or may re-
 " enter, re-possess, have, hold, and enjoy the said lands
 " or tenements, in his or their former estate, for and
 " during the life or lives, or so long term as the said
 " person, upon whose life the said estate or estates depend,
 " shall be living; and also shall, upon action to be
 " brought by him or them against the lessors, reversioners,
 " or tenants in possession, or other persons respectively,
 " which, since the time of the eviction, received the profits
 " of the lands or tenements, recover, for damages,
 " the full profits of the lands, &c. respectively, with
 " lawful interest for and from the time that he or they
 " were ousted of the same, and kept and held out of the
 " same, by the said lessors, reversioners, tenants, or other
 " persons, who after the eviction received the profits of
 " the lands, &c. or any of them respectively; as well
 " in the case when the person, upon whose life such
 " estate or estates did depend, shall be dead at the time of
 " bringing of the said action or actions, as if the per-
 " son were then living."

" AND for the more effectual discovery of the death of
 " persons pretended to be alive, to the prejudice of those
 " who claim estates after their deaths, it is by 6. Ann. c. 18
 " enacted, " that any person who hath or shall have any
 " claim or demand in or to any remainder, reversion, or
 " expectancy, in or to any estate, after the death of any
 " person within age, married woman, or any other person
 " whatsoever, upon affidavit made in the court of
 " chancery, by the person so claiming such estate, of his
 " or her title, and that he or she hath cause to believe
 " that such person is dead; and that his or her death is
 " concealed; may once a year move the Lord Chan-

" cellor

" cellor, &c. for the time being to order the guardian,
 " &c. concealing or suspected to conceal such person,
 " at such time and place as the court shall direct, on
 " personal or other due service of such order, to pro-
 " duce and shew to such person and persons (not ex-
 " ceeding two), as shall in such order be named by the
 " party prosecuting such order, such minor, &c. and
 " if such guardian, &c. shall refuse or neglect to pro-
 " duce or shew such infant, &c. on whose life any
 " such estate doth depend, according to the order, that
 " then the court of chancery is hereby authorized and
 " required to order such guardian, &c. to produce such
 " minor, &c. in court, or otherwise before com-
 " missioners to be appointed by the court, at such
 " time and place as the court shall direct; two of
 " which commissioners shall be nominated by the party
 " prosecuting such order, at his, her, or their costs: and
 " in case such guardian, &c. shall refuse or neglect to
 " produce such infant, &c. in court, or before such
 " commissioners, (whereof return shall be made by such
 " commissioners, and filed in the petty-bag office,) in
 " either or any of the said cases, the minor, &c. *shall be*
 " *taken to be dead*; and it shall be lawful for any person
 " claiming any right, title, or interest, in remainder, re-
 " version, or otherwise, after the death of such infant, &c.
 " to enter upon such lands, &c. as if such infant, &c.
 " were actually dead. And if it shall appear to the f. 2.
 " court, by affidavit, that such minor, &c. for whose
 " life such estate is holden, is, or lately was at some
 " place beyond the seas, in the affidavit to be men-
 " tioned, it shall and may be lawful for the party pro-
 " secuting such order, at his, her, or their costs, to
 " send over one or both the persons appointed by
 " the order, to view such minor, &c. for whose life
 " any

" any such estate is holden; and in case such guardian, &c.
 " concealing or suspected to conceal such persons as afore-
 " said, shall refuse or neglect to produce or procure to be
 " produced to such person or persons, a personal view of
 " such infant, &c. for whose life any such estate is
 " holden, that then and in such case such person or per-
 " sons are hereby required to make a true return of such
 " refusal or neglect to the court of chancery, which re-
 " turn shall be filed in the petty bag office; and there,
 " upon such minor, &c. for whose life any such estate
 " is holden, shall be taken to be dead, and it shall be
 " lawful for any person claiming any right, title, or in-
 " terest, in remainder, reversion, or otherwise, after the
 " death of such infant, &c. for whose life any such
 " estate is holden, to enter upon such lands, &c. as if
 " such infant, &c. for whose life any such estate is holden,
 " were actually dead. Provided always, that if it shall
 " afterwards appear, upon proof in any action to be
 " brought, that such infant, &c. for whose life any such
 " estate is holden, were alive at the time of such order
 " made, that then it shall be lawful for such infant, &c.
 " having any estate or interest determinable upon such
 " life, to re-enter upon the lands, &c. and for such
 " infant, &c. having any estate or interest determinable
 " upon such life, their executors, administrators, or as-
 " signs, to maintain an action against those who, since
 " the said order, received the profits of such lands, &c.
 " or their executors or administrators, and therein to
 " recover full damages for the profits of the same received,
 " from the time that such infants, &c. having any estate
 " or interest determinable upon such life, were ousted of
 " the possession of such lands, &c. Provided, that if
 " any such guardian, &c. holding or having any estate or
 " interest, determinable upon the life or lives of any
 " other

" other person or persons, shall, to the satisfaction of
 " the court, make appear, that he, she, or they, have
 " used the utmost endeavours to procure such infant,
 " &c. on whose life or lives such estate or interest doth
 " depend, to appear in court, or elsewhere, according
 " to the order of the court in that behalf made, and
 " cannot procure or compel such infant, &c. so to
 " appear, and that such infant, &c. on whose life or
 " lives such estate or interest depend, is, are, or were
 " living at the time of such return made and filed a-
 " foresaid, then it shall be lawful for such person or
 " persons to continue in possession of such estate, and
 " receive the rents and profits thereof, during the in-
 " fancy of such infant; and the life or lives of such
 " person or persons, on whose life or lives such estate
 " or interest doth or shall depend; as fully as if this act
 " had not been made. And that every person who, as
 " guardian or trustee for any infant, and every husband
 " seized in right of his wife only, and every other person
 " having any estate determinable upon any life or lives,
 " who after the determination of such particular estate
 " or interests, without the express consent of him, her, or
 " them, who are or shall be next and immediately intitled
 " upon and after the determination of such particular
 " estates or interests, shall hold over and continue in
 " possession of any manors, messuages, lands, tenements,
 " or hereditaments, shall be, and are hereby adjudged to
 " be trespassers; and that every person and persons, his,
 " her, and their executors, and administrators, who are
 " or shall be entitled to any such manors, &c. upon or
 " after the determination of such particular estates or in-
 " terests, may recover in damages against every such per-
 " son or persons so holding over, and against his, her, or
 " their executors or administrators, the full value of the
 " pro-

c. 9.

"profits received during such wrongful possession as
"afore said."

Gilb. Law of
Evid. 9.

WHERE the lessor claims as tenant by *elegit*, he must not only prove the judgment, and, by the judgment roll, that an *elegit* issued and was returned, but he must also prove the writ of *elegit* by a true copy thereof, and the inquisition thereon; for it is the *elegit* and the inquisition upon it, which carve out the term, and give the right of entry; the judgment roll being no more than a mere memorandum that the *elegit* issued and was returned. For which reason, a copy of it is not evidence; it being but a copy of that, which is only a copy or memorandum of the thing itself. Should it appear by the inquisition, that MORE than a moiety has been extended, the plaintiff cannot recover the possession; for by this, the sheriff having exceeded his authority, the execution is not only voidable, but void;

Salk. 563.
Ld. Raym.
318.

Doug. 472.
2vo.

BUT the sheriff is not bound to deliver a moiety of each particular tenement; only a moiety, *in value*, of the whole. In *Taylor v. the Earl of Abingdon*, the lessor of the plaintiff having recovered judgment against the defendant, sued out an *elegit*, upon which an inquisition was taken and returned by the sheriff; and an ejectment brought to obtain possession under it. The inquisition produced at the trial, mentioned by name all the different farms and tenements of which the defendant's estate consisted;—their value, the number of acres in each, the tenants names, yearly value besides reprises, and the clear yearly amount of the whole; then repeating the names of a certain number of them, their number of acres, more or less, and yearly amount, it found that those particular farms and tenements were a tre-

and equal moiety of all the said lands and premises of the defendant in the county.—“ which moiety of the said lands and premises, I, the said sheriff, on the day of taking this inquisition, have caused to be delivered to the lessor of the plaintiff, by the price and extent aforesaid, &c.” Upon the production of this inquisition, on the part of the defendant, it was objected, that the *elegit* had not been duly executed, and that the inquisition was void on the face of it; for that a moiety of each farm ought to have been extended and delivered to the lessor of the plaintiff, and not a certain number of distinct farms, amounting in value to a moiety of the whole. This objection being stated, a case was referred, setting forth the inquisition, in order to take the opinion of the court; subject to which opinion a verdict was found for the plaintiff.—LORD MANSFIELD. The reason of the thing is strongly with the practice and in favour of the plaintiff.—BULLER, J. There are many cases which shew that the inquisition and return are good, although separate lands have been extended, provided it does not appear that they amount in value to more than a moiety of the whole. The argument goes not only to every farm, but to every close and field. In short, the writ could not be executed according to that idea, but by delivering an undivided moiety: yet most clearly that is not the meaning of the statute, for it is agreed the moiety extended must be set out by metes and bounds. I take the meaning to be a moiety in value; which is ascertained by the jury. *L'execution per force d'un elegit sera fait del moiety par metes et boundas, et nemi per mie et per tout.* Dalt. 135. cites 31. Aff. but I can find no such passage in the book of assize.

1. Salk. 563.
2. Sid. 91.
Cro. Car. 319.

13. Ed. 1. 2. a.
c. 18.

1. Rol. Abr.
888.
3. Black. Com.
419.
Cro. El. 656.
Gilb. Exec.
39. 49.

COPYHOLD lands are not extendible under the *elegit*; nor a rent-seck, nor an advowson in gross, nor glebe belonging to a parsonage or vicarage. But by 29. Car. 2. c. 3. s. 10. it is enacted, "that it shall and may be lawful for every officer to whom any writ shall be directed, at the suit of any person, of, for, and upon any judgment, statute, or recognizance, to make and deliver execution unto the party in that behalf suing, of all such lands, &c. as any other person be in any manner of wise seised or possessed in trust for him against whom execution is so sued; like as the officer might or ought to have done, if the said party against whom execution shall be so sued, had been seised of such lands, &c. of such estate as they be seised of in trust for him at the time of the said execution sued; which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued."

3. T. Rep. 295.
2. Eq. Ca.
Abr. 381.

FORMERLY the sheriff delivered *actual* possession of a moiety of the lands, he now only delivers the *legal*; for to obtain *actual* possession, the plaintiff must proceed by *ejectment*.

East. 503.

WHERE the lessor claims as *CONUSEE* of a statute-merchant, he must prove a copy of the statute, of the *capias*, *lascus*, *extent*, or *liberate*, returned; for though, by the return of the extent, an interest is vested in the conusee, yet the *actual* possession of that interest is acquired by the *liberate*.

2. St. L. 218.

HERETOFORE, when an *ejectment* was brought for a *RECOVERY*, the plaintiff was called upon to prove that his

lessor

lessor was admitted, instituted, and inducted: that he read and subscribed the thirty-nine articles; and declared his assent to all things contained in the book of Common Prayer: but not to prove a title in the patron; for institution and induction, upon the presentation of a stranger, was sufficient to bar him who had right in an ejectment, and to put the rightful patron to his *quære impedit*. *Pre-Id. 426.*
 presentation, nevertheless, was required to be proved; and *1. Vent. 13.*
 institution was not deemed sufficient evidence to prove it, though recited in the letters of institution; especially if induction or possession had not followed. Proof however of a verbal presentation, was sufficient; though it could not be proved by him who presented, even if he were only grantee of the avoidance. Probably, in such case, evidence of a general reputation would be admitted.

THE strict evidence formerly required to sustain such a title, is at present somewhat relaxed; inasmuch that if the temporal title be established, the religious or political one will *now* be presumed; as in the case of *Powell v. Milburn or Milbank*, which was an action for money had and received. A verdict was found for the plaintiff, notwithstanding (among other objections) to the opinion of the court—whether, in *that* action, it was necessary for him to give evidence that he had performed the several requisites contained in the statutes 13. *El. c. 12. f. 3.* and 13. *and 14. Car. 2. c. 4.—Per Cur.* We are all of opinion, that in the present case, as no evidence was given by the defendant to raise a doubt, whether the plaintiff had subscribed, &c. it was not incumbent on him to give evidence that he had actually done so. The presumption always is, that every man conforms to the law; and that presumption shall stand till something appears to shake it. Nor is the defendant hereby put upon proving a direct negative. It is a negative qualified with circumstances. Some of the

the ceremonies are to be performed publicly, within a limited time; registers are kept of the others. And if evidence had been given, that a person had regularly attended the church, but heard nothing of the matter; or if search had been made in the bishop's register, and nothing been found there, this would have destroyed the presumption, and put the plaintiff on proof of his having performed the requisites. We found this opinion not only upon reason, but upon authorities ancient and modern. For though there are two cases which lean a little the other way, as *Snow* and *Philips*, and *Dr. Harcourt's* case, which does not come up to the point; yet in *Mank v. Butler*, it was held, that no such proof was necessary, in the first instance. The same was held at York assizes, by BARKLEY, Justice, August 1636. And in *Dr. Sherrard's* case (afterwards *Lord Harborough*), before WILMOT, Justice, at Sarum assizes, where a prebendary brought ejectment for a house belonging to his prebend, and was required to shew he had performed the requisites necessary by law to make him prebendary: he held that it ought to be presumed he had performed them, till something appears to the contrary. Upon these reasons, and these authorities, we are all of opinion to deliver the *possession* to the plaintiff.

1. Sid. 220.
2. Keb. 780.
Comb. 202.
3. Roll. Rep.
83.

Clayt. 43.

THOUGH COPYHOLDS, which are frequently objects of this action, are still said to be holden *at the will* of the lord, yet it is such a will as is *restrained* by the custom of the manor; customs which are preserved and evidenced by the rolls of the several courts-baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants have nothing to shew for their estates but the customs, and *admissions* in pursuance of them, entered on the rolls, or the copies of such

entries

entries witnessed by the steward, they are called *tenants by F. N. B.* 12.
copy of court roll, and the tenure itself a *copyhold*. And
the land must not only be parcel of and situate within the
manor, under which it is held; but must have been im-
memorially demised, or demiseable by copy of court roll; 3. Wils. 125.
for immemorial custom is the life of the tenure. They
are transferable only, (as are likewise *customary freeholds*;) 3. Burr. 2767.
in the court-baron of the lord, by *surrender*; which mode
of conveyance is so essential to the nature of a copyhold
estate, that it cannot possibly be transferred by any other
assurance. Even the devise of a copyhold will not, in
general, operate, unless the deviser has previously surren-
dered it to the use of his will; by which surrender the
legal interest of the estate passes, and the use is to be 2. Black. 1114.
directed by the will. The *admittance* is merely *form*.
The lord cannot alter or affect the surrender: he is a 3. Burr. 1544.
mere instrument, *compellable* to admit according to the 4. Burr. 1961.
surrender, which is a deposit in his hands; the land is
bound by it, and the *admittance* has *relation* to it. In 1. T. Rep. 682
short, it is the shadow to the substance, and makes but one *Ante*, 118. 262.
conveyance. The title, it is true, is not *formally* complete
till admittance. To the lord, *that* is certainly material, in 5. Burr. 2785.
respect of his fine: but he who is admitted, is in by him 2787.
who made the surrender. It is equally clear that an heir 3. T. Rep. 169.
at law may, *before* admittance, maintain an ejectment to *Ante*, 208.
assert his title. As, under circumstances, a *surrender* may *Post*, 338.
be presumed, so, in some cases, it will, in *equity*, be sup- *Ante*, 271.
plied; namely, in favour of *creditors*, *wives*, and *children*; 1. P. Wms. 60.
but only in favour of those *three* descriptions of persons. *ed*, 1793.
And though in copyhold estates there can be no general
occupant, since the freehold is never out of the lord, yet
it does not follow there can be no *special* occupant; as 2. Black. 1130.
when the lord has expressly granted the estate to one and
his heirs, during the life of *A. B.* Indeed the term "*spe-*
cial occupant" is a very forced and improper phrase;
there

there is therefore great weight in what is said by *Vaug.*
 Vaug. 301. that the heir takes it as a defendible freehold. Such
 however is the language of the law.

It is doubted whether 27. *EL. c. 4.* against fraudulent
 grants, extends to copyhold estates. There is great
 reason to say that it does; for in being so construed,
 it cannot work any prejudice to the lord, and the object
 of the statute is to suppress fraud.

Cowp. 710.

HAVING said thus much of this species of property, it
 is obvious that a material part of the title must rest on
 proof of the surrenders, admittances, &c. which is in general
 done by the steward producing on oath the rolls of
 the manor; or by the medium of verified examined
 copies; which is seldom, if ever adopted; the former mode
 being most generally pursued. Previous however to the
 trial, and after issue joined, in case a tenant has been
 refused by the lord to inspect the rolls of the manor, the
 court, on motion for that purpose, will order the inspection
 as prayed. For the court-rolls and books of a manor
 are of a public nature; the tenants have an interest in
 them, and the lord who has the custody of them is considered
 merely as a trustee. This right is nevertheless
 restricted, and with great propriety, to tenants of the
 manor; for the lord or tenants of another manor, not having
 any interest in, cannot of course claim any inspection
 of them. And in the case of *Smith v. Davies*, a freeholder
 was refused a rule to inspect the rolls of the manor, in a
 case between himself and the lord, touching a copyhold.
 The court said, "such a rule has never been heard of;"
 adding, "the plaintiff is not obliged to assist the defendant
 to make out his title." Yet in *Addington v. Chet*, in
 a question concerning a right of common, claimed by the
 defendant, as a freeholder, a rule was made absolute, on
 cause having been shown, to permit him to inspect the court-rolls

3. T. Rep. 141.

2. Black. 1061

2. Stra. 935.

2005.

22. Vin. 146.

2. Str. 1005.

3. T. Rep. 442.

1. Wils. 104.

2. Black. 1030.

olls of the plaintiff, who was lord of the manor. And if See Barnes
they appear on inspection to have been altered, the court 2. Vez. 620.
will order them to be produced at the trial. 1. Stra. 307.
Say. 76.

If the lessor claim as lord of a manor, having right by *Epif. Winton*
forfeiture, he must of course prove that he is lord; that *v. Mills & al.*
the defendant is a copyholder, and has incurred a for- *per Tracey,*
feiture: but presentment of the forfeiture need not *Surry 1707.*
be proved, nor the entry or seizure of the lord for the
forfeiture.

AND to prove the defendant a copyholder, the plaintiff *Ld. Raym.*
must prove an actual admittance; for it will not be suf- 726.
ficient to shew a descent to the defendant, and that he
did quit-rent; because nothing vests in him (as to any
question between him and the lord) before admittance,
and actual entry: and therefore if, after admittance, he
were to surrender without making an actual entry, the
surrender would be void.

In all cases of forfeiture, particularly that between
lord and tenant, the severity of the law (which rather
discourages against, than encourages them) warrants the
courts in requiring the greatest accuracy in the pro-
ceeding. The lord cannot, therefore, seize a copyhold
estate as forfeited, *pro defectu tenentis*, without a custom;
and if he be irregular in making an *absolute* seizure, he
cannot afterwards sustain it, even as a seizure *quousque*.
These, with some other points relative to this subject,
occurred in the case of *Tarrant v. Hellier*.—*LORD 3. T. Rep. 162.*
RAYMOND. There is one circumstance in this case of
great importance, which almost decides the question;
namely, that Sir S. Hellier died seised of the estate
the 12th of October 1784, leaving one of his co-
heires

heireffes a *feme covert*. Now, if this case were against the co-heirs, it must be admitted to be a case of the greatest severity; though that would not warrant the court in violating the rules of law. However, it gives us some satisfaction to be able to decide in favour of the heirs, agreeably with the rules of law. Some general rules must be admitted. It is clear that a *copyhold* estate cannot pass by will, unless there be a surrender to the uses of that will: it is equally clear that an heir at law may before admittance to a *copyhold* estate, maintain an ejectment to assert his title. The case therefore, here, is *prima facie* in favour of the heirs at law, unless the defendants can shew some title under which they may hold *adversely* against them; and being aware of the imbecillity of their own title under the will, they resort to the supposed title of the lord of the manor. Whether he has a right to confer that title on the defendants, depends on the points which have been made. The first point made is on the supposed forfeiture, by reason of the heirs of Sir S. Hellier neglecting to be admitted tenants, and to satisfy the fruits of tenure. Several cases were mentioned in argument, which shew that a general forfeiture of a *copyhold* estate, for not coming in, to be admitted, does not accrue, unless there be a custom to warrant it. In such cases, the lord has only a right to enter into possession, to satisfy himself for the injury he sustains for want of a tenant; and can only retain possession *quousque*. Sufficient appears in the case to shew, that the seizure was *irregular*. A seizure general and undefined, must necessarily be a seizure of the whole property; were it not, what other line could be drawn? So an entry upon an estate generally, is an entry for the whole; if it be for less, it should be so defined at the time. The case, however, does not rest on the

observation; for we collect from subsequent acts of the lord, which are unambiguous, what his idea was when he did seize. He made an *absolute grant* of the whole of his property to the defendant, his heirs and assigns for ever; taking a fine of 692l. on admission. Then I am bound to say that the lord entered, as for an *absolute forfeiture*. As this is a proceeding, where *the most strict regularity is necessary in all its parts*, we are warranted in saying that here was no seizure binding on the parties. Another point was made, which, if sustainable, would also give a right to the lord:—the supposed forfeiture which accrued by reason of a fine levied in the thirty-first year of the late reign, the deed to declare the uses of which, according to the case, comprehended the *copyhold* as well as freehold estates. How that fact was, we are not sufficiently apprised; but I think that, if the deed to declare the uses had not concluded the question, we ought to infer that only the freehold property was included in the fine. This claim of the lord of the manor, and consequently of the defendants who claim under him, depends on a clause in the eleventh section of the Supplement to *Coke's Copyholder*, and on two cases. Freem. 516.
Lucw. 803.

The Supplement to *The Copyholder* is not Lord Coke's work. From whose hands it came I do not know; though I do not mean to dispute that part generally: but think I can distinguish the section cited, from the present case. The words are, "if a copyholder levy a fine, &c. in such case no acceptance of the rent, or act done by the lord, shall be available to make the estate again good." This is said to be one of the cases which cannot be made good by this act of the lord. I admit that the act of the lord there referred to, and acts of that sort, will not make the estate good again; because acceptance of rent is of an ambiguous nature. Possession of the tenant may remain, though his former estate was

Z 2

gone;

gone; and there the rent may be accepted from him, under a tenancy from year to year. Therefore, an act of that kind shall not be binding on the lord, as a waiver of the forfeiture. But that some acts done by him shall operate as a waiver, cannot be disputed; they do not operate as a new grant, but admit the tenant to be in of his old title.

1. Lev. 26.

In *Milfax v. Baker*, it was held that the lord, by admitting a copyholder after forfeiture, *dispenses* with the forfeiture. The word "*dispenses*" is material, and shews that he does not grant a new title. The case of admission is only one instance: but things of the same nature will have the same effect; will shew that the lord dispenses with the forfeiture, and meant that the tenant should still continue in his tenancy. Now in this case the lord suffered *near thirty years to elapse* without taking advantage of the forfeiture, and by several solemn acts in his court, recognized the late *Sir S. Hellier* as his tenant. It was first presented that he died seised; then the lord required his heir to come in, and be admitted tenant. These are solemn acts of recognition, as admittance of the copyholder, in the case in *Levinz*; and I do not think I am straining that case, in saying, that any act equally solemn on the part of the lord, is sufficient to preclude him from taking advantage of the forfeiture. Then the 9. Geo. 1. c. 29. (a) protects infants and *femes covert* who are not in a situation to protect themselves, declaring that their estates shall not be forfeited for not coming to be admitted, and prescribing the mode to be taken by the lord. But it is said, that at any rate the lord was entitled to take the five other shares (b): be it so; but

(a) Intituled, "An act to enable lords of manors more easily to recover their fines, and to exempt infants and *femes covert* from forfeitures of their copyhold estates in particular cases."

(b) The estate descended to coparceners.

then he should have proceeded regularly to obtain possession of *that* estate to which he was entitled; instead of which he has proceeded, as for a forfeiture of *the whole*. And here, if there be any irregularity, it is sufficient to overturn the whole proceedings. Another ground has just occurred to me, as an answer to the supposed forfeiture by levying the fine, upon which I only hazard an opinion. I do not see why the statute of Limitations, ^{21. Jac. 1. c. 16.} which operates as a bar to *other* rights of entry, after twenty years, should not bar the lord in this case. It seems to me that he should have availed himself of his right of entry *within twenty years*. Clearly on the other grounds the plaintiff is entitled to recover.—ASHHURST, J. The courts have always leaned against forfeitures, which are odious in the law. In this case, the general right of the heirs stands confessed, and the only question is on the grounds made by the defendants to prevent that right from attaching. It appears that the lord entered, as for a forfeiture, therefore he elected to take under that title at the time, and cannot now resort to another, because he finds that that will not bear him out. He claimed under a title arising from the default of the heirs coming in, and under that idea made a *general seizure*; he did not affect at the time to seize *quousque*. Now it is admitted that he had no right to seize as for a forfeiture on *that* ground, without a special custom; which does not exist in this case. If it had rested on the seizure alone, I think it might have been explained by other acts of the lord: but his subsequent acts clearly prove that he meant to seize *absolutely*; for he afterwards made a grant of the estate to the defendants and their heirs. This is stated on the rolls of his court, and negatives the idea that he meant to seize *quousque*. With respect to the forfeiture by the fine which was levied in the late reign, it should have been

presented at his court as a forfeiture; for the lord was not bound to take advantage of the forfeiture: and sufficient appears on the rolls of the court to shew that the lord had waived it. The admittance of a copyholder afterwards would clearly have been a waiver, and any act *equally solemn*, will operate in the same manner. BULLER, J.—As to the fine, two questions arise. The first is, whether the fine did in fact extend to the copyhold estate? Secondly, if it did, what effect it had? With respect to the first, I am not satisfied that it did; and if the case had rested on that point, I should have been desirous of having it ascertained on another trial, for it does not follow that, because the deed to *declare the uses* comprehend a greater number of acres than the freehold estate, the copyhold was included in the fine. But secondly, supposing it was, the fine, as to the lord, was void. It is laid down, in the case of a forfeiture, that nothing removes the estate out of the tenant, but the lord's seizure. *Gilb. Ten.* 247. Here the lord never did seize for *that* forfeiture; therefore the fine was void as against the lord, because the copyholder continued in possession afterwards. *Saffyn's case*, 5. Co. 123. *Fermor's case*, 3. Co. 77. and *Margaret Podger's case*, 9. Co. 104. The passage in the Supp. to Coke's Copyf. 11. and the *dictum* of TREBY, Ch. J. in *Eastcourt v. Weekes*, must be understood as applicable only to those cases where the fine destroys the estate. Another instance there put, is, of a feoffment with livery; but that is where there is a transmutation of possession. And if there be transmutation of possession, either by fine or feoffment, it divests the lord's right, because it gains a fee-simple to the person to whom it is made or levied. But that is not so where the possession continues, which is the present case. It is like the case of mortgagor levying a fine, and continuing in possession, which is *no bar* to the mortgagee.

So where tenant in ancient demesne levied a fine, it did not extend to the lord; and the reason given in *Plowden* is, "because he claims no title or right to the land at the time of the fine levied, but to his seignory and services, issuing out of the land." Besides, there is great weight in the observation, that at the distance of more than twenty years, the lord could not enter for a forfeiture. There is also another answer to this point.—No lord can take advantage of a forfeiture, but he who is lord at the time of the forfeiture incurred, except only in the case put in Co. Cop. Supp. where the act of forfeiture destroys the estate: but here the estate was not destroyed.

1. Ventr. 82.
1. Lev. 272.
2. Vef. 482.
Plowd. 370.

NEXT as to the defendant's evidence.

If defendant prove a title out of the lessor, it will be sufficient, though he have no title in himself. But then he ought to prove a *subsisting* title out of the lessor; for the mere production of an ancient lease, though for a thousand years, will not be sufficient, unless he likewise prove possession under it within twenty years.

4. T. Rep. 682.

So if the defendant produce a mortgage-deed, where the interest has not been paid and the mortgagee never entered, it will not be sufficient to defeat the plaintiff, who claims under the mortgagor; because it will be presumed that the money was paid at the day; consequently it is no subsisting title: but if the defendant prove interest paid upon such mortgage, after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.

Per Holt, in
Wilson v. We-
therby, 8. Ann.
in Kent.

In like manner, it has been declared to be a settled point, that the *formal* title of a trustee should not, in an ejectment, be set up against *cestuy que trust*; because, from the nature of the two rights, the latter is to have the possession.

3. Burr. 1901.

session. And LORD MANSFIELD, on the argument of *3. Burr. 1416. Lade v. Holford*, said that he, and many other of the Judges, had resolved never to suffer a plaintiff in ejectment to be non-suited, by a term outstanding in his own trustee; or a satisfied term set up by a mortgagor against a mortgagee; but would direct the jury to *presume* it surrendered. A mere trust estate shall not be set up against *cestui que trust*, to defeat him in a clear case; for then the rule stands on strong beneficial principles; because, in ejectment, the question is, who is entitled to the possession: but if the trust be *doubtful*, a court of law will not decide upon it, in ejectment: it must be put in another mode of enquiry. And upon the same principle it was formerly holden, that receipt for rent by a stranger, was no evidence of possession, so as to take it out of him in whom the right was: for that was no disseisin without the admission of him who had the right, even though the stranger should make a lease to the tenant, by indenture, reserving rent; unless he also made an actual entry. But if the tenant declared he was in possession for a stranger, it might be proper evidence for a jury; especially if the stranger had any colour of title.

25. G. 3. B. R. This doctrine gave rise to the decision in *Bristow v. 1. T. Rep. 758. Pegge*. In that case, an ejectment was brought for a moiety of the manor of *Winkburne*, &c. under the will of *D. Burnell*, as one of his coheirs. By the testator's marriage-settlement in 1748, two terms *in trust* were created: one for ninety-nine years, to secure an annuity of 200*l.* to his mother; the other for one thousand years, for raising 3000*l.* for his wife, in case she should have no issue; the money to be raised out of the rents, or by sale or mortgage. The testator died in 1774, having no issue, and devised all his estates to *trustees* and their heirs, to the use of them and their heirs; in trust, after the death of

his widow (who was entitled to a like estate under the marriage-settlement), for such person or persons, as, according to the laws of descent, should be his heirs at law, and the heirs of their bodies, to take as tenants in common, &c. if more than one. The defendant filed a bill in chancery in 1776, against all persons who were supposed to have any claim as heirs at law, and against the trustees; and an issue was directed, under which he was found heir at law, by descent, from the daughter of a common ancestor. The lessor of the plaintiff also had filed a bill in 1783, his claim having never been known before; but upon death of the widow, he brought his ejectment, and proved his pedigree from another daughter of the same common ancestor. At the trial the defendant set up *the terms*; the testator's mother being still living, and her annuity regularly paid by the receiver appointed by the court of chancery; the three thousand pounds having likewise been raised for his widow, and the term assigned in mortgage. The judge who tried the cause, nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the plaintiff, if the court should be of opinion that he was entitled to recover.—On the motion, it was stated, that the receiver had been appointed by the court of chancery during the life of the widow, and for such premises only as her life-estate did not extend to; and that the lessor of the plaintiff did not wish to disturb *the terms*, but was ready to undertake of the charge. For the plaintiff it was argued, that as the parties claimed from the same common ancestor, under one and the same title, one of them ought not to be permitted to set up *the terms*, against the title of the other; since he himself was permitted to shew his title, subject to the same incumbrances. Such an objection ought not to prevail between such parties; and the possession of one tenant in common, was the possession

possession of both. That the annuity not being in arrear, the trustees of the term of ninety-nine years, themselves, could not recover possession. Besides, a *trust* estate should never be set up against *cestui que trust*. And as to the remainder, after the terms were satisfied, there was a *resulting* trust, and the termors were trustees for the heirs at law. Nay, till default of payment of interest, or the money raised, the terms were in trust for the heir at law. That an ejectment was in nature of a feigned issue, merely intended to try the real title. And in this instance, the lessor of the plaintiff was willing to admit the charge of the terms, and take subject to them.—For the defendant it was stated, if tenant in common holds *adversely*, an ejectment will lie; but the defendant did not hold *adversely*; and the terms set up were no part of the title of either party, but *paramount* to both. The purposes for which they were created, had arisen and were subsisting. That if an ejectment were such an issue as was contended, the doctrine of terms would be extinguished, and all differences, by reason of their being outstanding, at an end. The rule was, that a plaintiff in ejectment must recover by the strength of his own title, and must shew a right of possession. The terms being unsatisfied, the plaintiff was not entitled to possession. It was true, that a *satisfaction* term could not be set up. But the only cases, where unsatisfied terms could not be set up, were against *cestui que trust* in a *clear* case, or against those under whom the defendant claims. But if the trust be *doubtful*, the court will leave the party applying, to his remedy in equity. And a case was cited, which was tried before MR. JUSTICE ASHHURST, at Leicester summer assizes, 1784, *Henson v Beaumont*, which was an ejectment brought by a devisee against the heir at law, who produced a mortgage term on which the plaintiff was nonsuited; that being deemed a complete bar.—LORD MANSFIELD. An ejectment

is a fictitious remedy to try the title to the possession of lands. It is of infinite consequence, that it should be adapted to attain the ends of justice, and not entangled in the nets of form. Great difficulties have arisen, as to the legal form of passing land, from the modes of conveyancing in England, since the statute of Uses. Trusts are a mode of conveyance peculiar to this country. In all other countries, the person *entitled* has the right and possession in himself. But in England, estates are vested in *trustees*, on whose death it becomes difficult to find out their representatives; and the owner cannot get a complete title. If it were necessary to take assignments of *satisfied* terms, terrible inconveniences would ensue from the representatives of trustees not being to be found. Sir E. Northey's clerk was trustee of near half the great estates in the kingdom; on his death, it was not known who was his heir or representative. So that where a *trust* term is a mere matter of form, and the deeds mere muniments of another's estate, it shall not be set up against the real owner. It is therefore settled, that a *satisfied* trust shall be taken to be a trust for the benefit of the heir at law. A trust shall never be set up against him for whom the trust was intended. It is a mere form of conveyance; and it is admitted, that where the term is in trust for the benefit of the lessor of the plaintiff, the defendant shall not set it up, in ejectment, as a bar to his recovery. To go a step further. Third persons may have titles, and therefore the court say, that where there is tenant in possession under a lease, which is a bar to the recovery of the lessor, he being to recover by the strength of his own title, yet to prevent this from being turned improperly against the person entitled to the inheritance, whose right is not disputed by the tenant—if the lessor dispute the property only against another, and give notice to the tenant that he does not mean to disturb his tenancy, the court will never

never suffer the tenant to set up the lease, as a bar to the recovery. There is another distinction to be taken; whether, supposing a title superior to that of the lessor of the plaintiff, exists in a third person, who might recover the possession against him, it lies in the mouth of the defendant to say so, in answer to an ejectment brought against himself by a party having a better title than his own. I found this point settled before I came into this court, that the court never suffers a mortgagor to set up

See *ante*, 109.

the title of a third person, against his mortgagee. For he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover possession. Nor shall a tenant who has paid rent, and acted as such, ever set up the superior title of a third person, against his lessor, in bar of an ejectment brought by him; for the tenant derives his title from him. Laying down these principles, let us now see the application of them to this case. There are disputes between the plaintiff and the defendant, who are coheirs; as such, the plaintiff claims half of the property, and wishes to be admitted into possession of the premises with the defendant. He proves his descent. Then what is the defence set up? A trust for a third person, an annuity, is set up. The plaintiff admits the charge, and says he only claims *subject* to the incumbrance. The trustees do not assert the title. Then shall others be admitted to set it up? It is clear; the other coheirs shall not be permitted to dispute the title with him. He and the defendant have an equitable title, as tenants in common, and the plaintiff must recover a moiety.—WILLES, J. concurred.—A. HURST, J. In such a case as this, a *legal* bar shall never be set up in ejectment against the justice of the case. The trustees may perform their functions as well after both the parties are in possession. The old doctrine is relaxed in many instances.—BULLER, J. An objection has been

See *ante*, 18.

take

taken, that the plaintiff in ejectment must recover by the strength of his own title. The old cases certainly say so; but for the last forty or fifty years, constant exceptions to this rule have been admitted. One case, which is received as clear law, and is an exception to it, is that of a tenant, who cannot set up the title of a mortgagee against the mortgagor; because he holds under the mortgagor, and has admitted his title. There was a case before me at Guildhall, and I believe another upon the Oxford circuit, of the same nature, where a lessor for years had obtained possession of some mortgage-deeds, and endeavoured to set up that title against the mortgagor; but though this shewed that the plaintiff had no right to recover, as against the mortgagee, yet I permitted him to do so in *that* instance; and the decision was acquiesced under. It is not therefore true, that an outstanding *unsatisfied* term is *always* an answer to a plaintiff in ejectment. So long ago as the time of JUSTICE GUNDRY, where an outstanding *satisfied* term was offered in ejectment, as a bar to the plaintiff's recovery, that Judge refused to admit it, saying, there was no use in taking an outstanding term, but for the sake of the conveyancers' pockets; since which time it has been the uniform doctrine, that if the plaintiff is entitled to the *beneficial* interest, he shall recover the possession. The next objection is, that this is a reversionary interest; but that is not material; for it has been further ruled of late years, that the lessor of a plaintiff may recover, in ejectment, a reversionary interest, subject to lease, and right of present possession existing in another. The annuitant is only entitled to her 200*l.* *per annum*, not to the possession itself, whilst there is no fault: indeed she does not require it. But the heir-at-law is entitled to the possession, subject to that charge. The annuitant however is in a different situation from the mortgagee; for the latter is intitled to receive the whole, in diminution

of

of the principal and interest. So the plaintiff must have a general judgment for that part, which is not in possession of the receiver; and as to that which is, must enter into a rule not to disturb that possession, submitting to the mortgage and annuity.

Ante, 72. 77.

SEE also the cases of *Norris v. Morgan*, and *Willoughby v. Willoughby*.

Ante, 15.

THOUGH this doctrine was acquiesced in for several years, as of great utility in the administration of justice between two who meant to try a right, without disturbing the legal possession of a third; yet it has since been deliberately questioned, if not altogether over-ruled, by the decision of the court of king's bench, on the case of *Hodsdon v. Staple*: in which, however, MR. JUSTICE BULLER, with a *consistency* and *ability* which reflect the highest honour on his judicial character, sustained his former opinion on the subject.

1. Burr. 1079.
3. Black. 259.

As title in this action sometimes turns on the validity of MARRIAGE, it is proper to notice the evidence which is necessary, either to prove, or to avoid it. Though there are many cases in which the law of the place, where the transaction happened, is allowed to be the rule by which its legality shall be judged; and though the law of *England* be in this respect as liberal as other laws in general are; yet the *lex loci* cannot in all cases govern. It is in general true, that a marriage in a foreign country must be governed by the law of that country where the marriage was solemnized: but marriages in *Scotland*, persons going from hence, for that purpose, may, according to the opinion of *Huberus*, and other writers, come under a different consideration.

pa. 33.

IN *England*, "for the better preventing of clan-^{26. Geo. 2.}
 " destine marriages," it is, by *positive* law, enacted, "that"^{c. 33.}
 " all banns of matrimony shall be published in an audible
 " manner in the parish church, or in some public chapel,
 " in which public chapel banns of matrimony *have been*
 " USUALLY published, of or belonging to such parish or
 " chapelry, wherein the persons to be married shall dwell,
 " according to the form of words prescribed by the
 " rubrick prefixed to the office of matrimony in the book
 " of common prayer, upon three *Sundays* preceding the
 " solemnization of marriage, during the time of morning
 " service, or of evening service (if there be no morning
 " service in such church or chapel upon any of those
 " *Sundays*), immediately after the second lesson: and
 " whensoever it shall happen that the persons to be
 " married shall dwell in divers parishes or chapelries, the
 " banns shall, in like manner, be published in the church
 " or chapel belonging to such parish or chapelry wherein
 " each of the persons shall dwell; and where both
 " or either of the persons to be married shall dwell in
 " any extra-parochial place, (having no church or chapel
 " wherein banns have been usually published) then the
 " banns shall, in like manner, be published in the
 " parish church or chapel belonging to some parish
 " or chapelry adjoining to such extra-parochial place;
 " and where banns shall be published in any church
 " or chapel belonging to any parish adjoining to
 " such extra-parochial place, the minister publishing
 " such banns, shall, in writing under his hand, certify
 " the publication thereof, in such manner as if either of
 " the persons to be married dwelt in such adjoining
 " parish; and that all other the rules, prescribed by the
 " rubrick concerning the publication of banns, and the
 " solemnization of matrimony, not hereby altered, shall
 " be duly observed; and that in all cases where banns
 " shall

f. 3.

" shall have been published, the marriage shall be
 " solemnized in one of the parish churches or chapels
 " where such banns have been published, and in no
 " other place whatsoever. Provided, that no minister
 " solemnizing marriages between persons, both or one
 " of whom shall be under the age of twenty-one
 " years, after banns published, shall be punishable by
 " ecclesiastical censures for solemnizing such marriages
 " without consent of parents or guardians, whose
 " consent is required by law; unless such minister
 " shall have notice of the dissent of such parents or
 " guardians: and in case such parents or guardians, or
 " one of them, shall openly and publicly declare, or
 " cause to be declared in the church or chapel where the
 " banns shall be so published, at the time of such pub-
 " lication, his, her, or their dissent to such marriage, such
 " publication of banns shall be absolutely void. That
 " no licence of marriage shall be granted to solemnize
 " any marriage in any other church or chapel, than in
 " the parish church or public chapel of or belonging to
 " the parish or chapelry, within which the usual place of
 " abode of one of the persons to be married shall have
 " been for the space of four weeks, immediately before
 " the granting of such licence; or where both or either
 " of the parties to be married shall dwell in any extra-
 " parochial place, having no church or chapel wherein
 " banns have been usually published, then in the parish
 " church or chapel belonging to some parish or chapelry
 " adjoining to such extraparochial place, and in no other
 " place whatsoever. Provided, that all parishes where
 " there shall be no parish church or chapel belonging
 " thereto, or none wherein divine service shall be usually
 " celebrated every *Sunday*, may be deemed extraparochial
 " places for the purposes of this act, but not for any
 " other purpose. Provided, that after the solemnization

f. 4.

f. 5.

f. 10.

" 6

of any marriage under publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published; or, where the marriage is by licence, to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage. That all marriages solemnized by licence, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties, so under age (if then living), first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian, then of the mother (if living and unmarried), or if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of chancery, shall be absolutely null and void to all intents and purposes whatsoever. That in case any of them whose consent is made necessary as aforesaid, shall be *non compos mentis*, or in parts beyond the seas, or shall refuse or withhold their consent to the marriage of any person, it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the Lord Chancellor, &c. for the time being (who is impowered to proceed upon such petition, in a summary way); and in case the marriage proposed shall, upon examination, appear

f. 11.

f. 12.

2. Burr. 398.

f. 14.

" to be proper, shall judicially declare the same to be
 " so, by an order of court; and such order shall be
 " good and effectual to all intents and purposes, as if
 " the guardian or guardians, or mother of the person
 " so petitioning, had consented to such marriage. And
 " for preventing undue entries and abuses in registers
 " of marriages, the church and chapel wardens of every
 " parish, or chapelry, shall provide proper books of
 " vellum, or good and durable paper, in which all mar-
 " riages and banns of marriages, there published or so-
 " lemnized, shall be registered; and every page thereof
 " shall be marked at the top, with the figure of the num-
 " ber of every such page, beginning at the second leaf
 " with number one; and every leaf or page so num-
 " bered, shall be ruled with lines at proper and equal
 " distances from each other, or as near as may be; and
 " all banns and marriages published or celebrated in any
 " church or chapel, or within any such parish or cha-
 " pelry, shall be respectively entered, registered, printed
 " or written upon, or as near as conveniently may be
 " to such ruled lines, and shall be signed by the min-
 " ister, or by some other person in his presence, and
 " by his direction; and such entries shall be made
 " aforesaid, on or near such lines in successive order
 " where the paper is not damaged or decayed, by ac-
 " cident or length of time, until a new book shall be
 " thought proper or necessary to be provided for the
 " same purposes: and then the directions shall be ob-
 " served in every such new book; and all books pro-
 " vided as aforesaid, shall be deemed to belong to every
 " such parish or chapel respectively, and shall be care-
 " fully kept and preserved for public use. And in or-
 " der to preserve the evidence of marriages, and to make
 " the proof thereof more certain and easy, and for the
 " direction

f. 15.

direction of ministers in the celebration of marriages
 "and registering thereof, all marriages shall be solemn-
 ized in the presence of two or more credible wit-
 nesses, besides the minister who shall celebrate the
 same; and that immediately after the celebration of
 every marriage, an entry thereof shall be made in such
 register to be kept as aforesaid, in which entry or re-
 gister it shall be expressed, that the marriage was ce-
 lebrated by banns or licence; and if both or either
 of the parties married by licence be under age, with
 consent of parents or guardians, as the case shall be,
 and shall be signed by the minister, with his proper ad-
 dition, and also by the parties married, and attested by
 such two witnesses." The act does not extend to Scot-
 land; to any of the royal family; nor to any marriages
 amongst *quakers*, or persons professing the *Jewish* reli-
 gion, where both parties are *quakers*, or persons professing
 the *Jewish* religion; nor to any marriage solemnized be-
 yond the seas.

A MARRIAGE was deemed *void*, because celebrated
 in a chapel which had been erected *subsequent* to the
 passing of this act, and that although marriages had been
de facto frequently celebrated there. In consequence of
 which, another act has since been passed, making all
 marriages celebrated in any parish church or public cha-
 pel erected *since* 26. Geo. 2. c. 33. and consecrated, *valid* in

Doug. 8vo,
658.

211 Geo. 3.

c. 53.

So it has been determined, that the act was avowedly
 made, not only against both the contracting parties,
 but against the *innocent* children also; that therefore
 they cannot waive the disabilities of it, at their own
 option; the marriage being *void*, to all purposes, even
 though

A. a. 2.

though the parties should afterwards agree to it, where ever the fact appears directly contrary to the statute.

But where there has been a marriage in fact *illegal*, for want of conforming to the terms of the statute, it may nevertheless, under circumstances, be left to a jury to *presume* a subsequent legal marriage. Thus in *Wilkinson v. Pague*, which was an action on a promissory note given to the plaintiff by the defendant, in consideration of the plaintiff marrying his daughter, the defence set up was, that though there had been a marriage in fact, it was not a legal one, because the parties were married by licence, when the plaintiff was under age, without the consent of his parents or guardian. Both his parents were dead when the marriage was celebrated, and there was no legal guardian; but his mother, who survived the father on her death-bed, desired a friend to become guardian of her son, with whose approbation the marriage was had. It also appeared, that when the plaintiff came of age, his wife was lying in *extremis* on her death-bed, and died three weeks afterwards: but in her life-time, she and the plaintiff were always treated by the defendant and his family as man and wife. Upon these facts, the Judge left it to the jury, to *presume* a subsequent marriage, which they did, and found a verdict for the plaintiff.—Lord KENYON, Ch. J. on the motion for a new trial, said, “in this case, though the first marriage was defective, a subsequent one might have taken place: the parties cohabited together for a length of time, and were treated by the defendant himself as man and wife; these circumstances therefore afforded a ground on which the jury *presumed* a subsequent marriage; and if there were a ground of presumption, it is sufficient in a case like this. The parties did not intend to elude the marriage act, and all their friends were fully informed of and concurred

4 T. Rep. 468.

the former marriage. And we should ill exercise the discretion vested in the court, if, after the jury had presumed a subsequent legal marriage, under all the circumstances of this case, we were to set aside their verdict. In a late case of *Standen v. Standen*, the jury presumed a legal marriage, though there was strong evidence to induce a suspicion, that there had not been time enough for the banns to have been published three times."—BULLER, J. If the verdict be consistent with the justice, conscience, and equity of the case, we ought not to grant a new trial. This is not so strong a case as that of *Deerley v. the Duchess of Mazarine*, where the court refused to grant a new trial, though the verdict was against law. But in this case, I doubt whether it was necessary to prove a legal marriage, considering the situation in which all the parties stood. I think a marriage in fact was sufficient. In the case of settlements, no derivative title can be set up, unless a legal marriage be established.

Sit. in Midd,
aft. East. 1789

Salk. 116. 646.

A MARRIAGE *in fact* may be proved, either by a copy of the register, or by *viva voce* evidence of the ceremony, corroborated by circumstances, identifying the parties. But in *this* action, it is not necessary to prove a marriage *in fact*: a *reputed* marriage will be sufficient; and that may be substantiated by cohabitation, reputation, or other circumstances, from which marriage may be inferred.

3. Blac. 632.

4. Burr. 2056.

AND as to the proof of *identity*, whatever is sufficient to satisfy a jury, is good evidence, even in an action for criminal conversation. As in *Birt v. Barlow*, which was an action of that sort, the plaintiff was nonsuited. On motion to set aside the nonsuit, LORD MANSFIELD said, from the report it appears, that the ground of the nonsuit was an idea, that *identity* must be proved by the minis-

Doug. 2vo.

170.

and see

1. Blac. 367.

ter, or some of the attesting witnesses, unless their not being produced, was accounted for, in the same manner as is required in the case of subscribing witnesses to a deed. The counsel for the plaintiff stated other evidence of the identity; whether such as would have been sufficient when produced, (as that might or might not be, according to the differences arising from the manner of stating it), I give no opinion. But the Judge decided, that it was necessary to produce some of the *subscribing* witnesses. The clauses in the marriage act, relative to registers, are of infinite utility. They were meant, as well to prevent false entries, as to guard against illegal marriages, without licence or the publication of banns. The registers are directed to be kept as public books, accompanied with every means of authenticity. But besides facilitating and ascertaining the evidence of marriage, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since inquiries *post mortem* have been disused, that it is easier to establish one for five hundred years back, before the time of Charles II. than one hundred years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act were so construed, as to render the proof of marriage more difficult than formerly. I take it for granted, that the law stands as it did *before* in that respect. Registers are in the nature of records, and need not be produced nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties, describing themselves by such and such names, and places of abode, though it does not prove the *identity*. An action for criminal conversation, is the *only* civil case, where it is necessary to prove an *actual* marriage. In other cases, cohabitation, reputation, &c. are equally sufficient, since the marriage act, as before. But an action for criminal conversation

conversation

conversation has a mixture of penal prosecution; for which
 reason, and because it might be turned to bad purposes,
 by persons giving the name and character of wife to
 women, to whom they are not married, it struck me in the
 case of *Morris v. Miller*, that in such an action, a marriage 4 Burr. 2057.
in fact must be proved. I say, a marriage *in fact*, because
 marriages are not always registered. There are marriages
 among particular sorts of dissenters, where the proof by
 register would be impossible; and DENNISON, J. in a
 case of that kind which came before him, admitted other
 proof of an actual marriage. But as to the proof of
 identity, whatever is sufficient to satisfy a jury, is good
 evidence. If neither the minister, nor the clerk, nor any
 of the subscribing witnesses, were acquainted with the
 married couple, in such a case, none of them might be
 able to prove the identity: but it may be proved in a
 thousand other ways. Suppose the bell-ringers were
 called, and proved that they rung the bells, and came im-
 mediately after the marriage, and were paid by the parties;
 suppose the hand-writing of the parties were proved; sup-
 pose persons called who were present at the wedding-
 dinner, &c."—BULLER, J. The original register is not
 necessary to be produced, and it is only where that is
 required, that subscribing witnesses must be called. In
 this case, the wife's maiden name was *Harriet Champneys*:
 suppose a maid-servant proved that she always went by that
 name till the day of marriage, that she went out that
 day, and on her return, and ever since, was called Mrs.
 Champneys? surely that would have been evidence of the
 identity.—Rule absolute.
 So, in the same species of action, the testimony of
 one, who was present at the ceremony, will be sufficient;
 but it is not necessary to prove a marriage according to the
 rites of the church of *England*; for if the party be of any Bal. Ni. Pri. 27-23.

1. Burr. Set.
Ca. 506.

Sitt. Midd.
1776.

4. Burr. 2057.

God. 144.
3. Burlet. 139

Gibs. 204.

particular religious sect, as for instance, a Jew, an anabaptist, or a quaker, it will be sufficient to prove a marriage according to the ceremonies of that particular sect. And proof by those who saw the marriage is *prima facie* sufficient; for whoever wishes to impeach it, must shew wherein it was irregular. But in *Howard v. Burtonwood*, in order to confirm a witness who was present at the marriage solemnized in the Fleet, the Fleet register of 1737 was offered in evidence. Lord Ch. J. De Grey refused to admit it, saying, the whole transaction was illegal, and the register made by a person under no legal or moral obligation, and therefore not entitled to credit. So, (in *Morris v. Miller*) the register or books of *Mayfair* chapel were refused, the minister having been transported and the clerk dead. These however only apply to cases where proof of an actual marriage is required; not to those where cohabitation, reputation, &c. are sufficient (as they were before the statute took place,) *prima facie* evidence of a marriage.

UNDOUBTEDLY the *parish register of christenings, marriages, and burials*, is evidence to prove either of those circumstances; as is, a sworn copy of it; for though it be not matter of record, it is nevertheless of public concern and importance. The keeping of such a church-book for the age of those born and christened in a parish, was first instituted in the 30th year of *Henry the eighth*; and the following canon was principally no more than a confirmation of one of Lord CROMWELL's injunctions of 1538.—“In every parish church (*Can. 70.*) and chapel shall be provided one parchment book, at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial, which have been in the parish since the time that the law was first made in that behalf, so far as the ancient books there

" can be procured; but especially since the beginning of
 " the reign of the late queen. And for safe keeping the
 " said book, the churchwardens, at the charge of the
 " parish, shall provide *one sure coffer*, with three locks and
 " keys; whereof one to remain with the minister, and
 " the other two with the churchwardens severally; so
 " that neither the minister, without the two church-
 " wardens, nor the churchwardens, without the minister,
 " shall at any time take that book out of the coffer.
 " And henceforth, upon every sabbath day, immediately
 " after morning or evening prayer, the minister and
 " churchwardens shall take the parchment book out of
 " the coffer, and the minister, in the presence of the
 " churchwardens, shall write and record in the book, the
 " names of all persons christened, together with the names
 " and fir-names of their parents, and also the names of
 " all persons married and buried in that parish, in the
 " week before, and the day and year of every such
 " christening, marriage, and burial; and that done, they
 " shall lay up that book in the coffer as before: and the
 " minister and churchwardens, unto every page of that
 " book, when it shall be filled with such inscriptions,
 " shall subscribe their names. And the churchwardens
 " shall once every year, within one month after the
 " twenty-fifth day of March, transmit unto the bishop
 " of the diocese, or his chancellor, a true copy of the
 " names of all persons christened, married, or buried in
 " their parish, in the year before (ended the said twenty-
 " fifth day of March); and the certain days and months
 " in which every such christening, marriage, and burial was
 " had, to be subscribed with the hands of the said minister
 " and churchwardens, to the end the same may faithfully
 " be preserved in the registry of the said bishop; which
 " certificate shall be received without fee. And if the
 " minister or churchwardens shall be negligent in per-
 " formance

2. Sid. 71.
Gibs. 1. v. 229.

Ante, 354.

2. Barnard.
269.
B. Ni. P. 249.

“formance of any thing herein contained, it shall be
“lawful for the bishop or his chancellor to convent
“them, and proceed against every of them as contemners
“of this our constitution.” Which book, being “*faith-*
“*fully preserved*,” is good evidence, and the falsifying of
it, punishable at the common law. As to *burials*, it is
enacted by 30. Car. 2. c. 3. “that the minister for every
“parish shall keep a register, in a book to be provided at
“the charge of the parish, and make a true entry of all
“burials within his parish.” So, as to *marriages*, the
same is enjoined by 26. Geo. 2. c. 33. Though these
books are the property of the parish, yet every per-
son has a right to *inspect* and *copy* them; but the per-
son who has the custody, may not be legally compellable
to make out copies, or grant a certificate of them. And
the register of the Navy-office, it is said, with proof of the
method there used, to return all persons dead with the
mark “*D d.*” is sufficient evidence of a death.

Of all the species of instrumentary evidence, *that* of
the sworn copy of a *register*, is the most dangerous. It
has been long a subject of complaint in the profession,
being, as it is, most capable of *imposition*, and least liable
to *detection*. In the year 1791, at the summer assizes for
Surry, before Lord Chief Baron EYRE, an ejectment
cause of considerable importance was tried (*Angel v.*
Browne), in which the plaintiff claimed title as heir at
law. To prove his pedigree, and connect him with the
family, he was previously prepared with a *copy* of a re-
gister of the *burial* of the person from whom he was
stated to have been lineally descended; and which, if true,
would have proved him heir at law to the person he
seised. Owing to a fortuitous, unforeseen circumstance,
the *register* itself was produced at the trial, in which no
such entry existed. As there cannot be either difficulty or
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danger in producing the *register* itself, which, though it be possible, is scarcely probable should be required at two places at the same time, it should always be produced. If, however, its removal be an objection, and that for public purposes it ought to be stationary, the Legislature should interpose its authority, and enact, that a *certificate* of the entry required, properly stamped, and under the hand and seal of the minister, should be *admissible* evidence; enjoining him to grant it, on request, and payment of an adequate fee for the purpose; making it, at the same time, not only penal for him to misconduct himself in stating the entry, but for any other person to forge or counterfeit it; or for any one to insert any false entry in the register itself.

WITH respect to cohabitation, it is the practice to admit evidence of what the parties have been heard to say as to their being, or not being, married; inasmuch as the presumption arising from cohabitation, is either strengthened or weakened by such declarations; these, however, are not to be given in evidence directly, though they may be assigned by the witnesses as a reason for their belief.

AND though, by the canon law, a marriage is not permitted to be proved, *inter vivos*, by mere circumstantial evidence, yet strong, solemn, and deliberate acknowledgements of marriage, for several years together, has, on appeal, been deemed sufficient, by the ecclesiastical law, to establish it *inter vivos*, though no actual proof of the marriage could be obtained. The supposed marriage was previous to 26. Geo. 2. Such was the case of *Harvey v. s. Blac.* 877. *Harvey*, at the Delegates.

Carth. 225.
Stra. 960.

2. Will. 123.

Hal. Hist. C. L.
v. 39. ed.
1794.

A SENTENCE in the ecclesiastical court, in a cause of jactitation, has been held to be *conclusive* evidence against a marriage, till reversed by appeal. But the determination may be doubted.

In the case of the late *Duchess of Kingston*, the following questions were put to the Judges,

I. WHETHER a sentence of the spiritual court against a marriage, in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

II. WHETHER, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

THE Chief Justice of the common pleas (a), having conferred with the rest of the Judges, delivered the following unanimous opinion upon the questions.

“As a general principle, a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make defence, to examine witnesses, or appeal from a judgment he might think erroneous: therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, and the judgment of the court upon fact found, though evidence against the parties, and all claiming under THEM, are not, in general, to be used to the prejudice

(a) Sir William De Grey; created Lord Walsingham in 1786.

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strangers. There are some exceptions to this general rule, founded upon particular reasons; but, not being applicable to the present subject, it is unnecessary to state them.

“FROM the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, *conclusive*, between the same parties, upon the same matter, directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent, or exclusive jurisdiction, is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

“UPON the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding *directly* the legality of marriage; and of enforcing, *specifically*, the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction: they do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon

upon the record in certain real writs, upon the legality of marriage, or its immediate consequence, "general baf-
 "tardy;" or, in like manner, in some other particular instances, lying peculiarly in the knowledge of their courts; as profession, deprivation, and some others. In those cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary; whose certificate, when returned, received, and entered upon record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute of the 9th of *Henry the sixth*, requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceeding. But even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue be accompanied with any special circumstances; as, if a second issue, triable by jury, is formed, upon the same record; or, if the effect of the same issue is put into another form; a jury is to decide, and not the ordinary to certify, the truth. So that the trial of marriage, either as to legality or fact, was not absolutely, and from its nature an object *alieni fori*. There was a time, when the spiritual courts wished that their determinations might, in all cases, be received as authentic in the temporal courts; but the demand was deservedly rejected. It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the temporal courts from shewing the same respect to their proceedings, as they did to those in other courts. Therefore where, in civil causes, they found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as PROOF of the fact; it being an au-

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authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts. Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy, arising incidentally upon a claim to a real estate. A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage; and, in like manner, in personal actions, immediately founded upon a supposed marriage. So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted evidence against such contract, in an action brought upon the same promise for damages; it being a direct sentence of a competent court, disproving the ground of the action. So a sentence of nullity, is equally evidence in a personal action against a defence founded upon a supposed coverture. But in all these cases, the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties, and had acquiesced.

"But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration. First, because the parties are not the same; for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, or to examine witnesses, or in any manner to intervene or appeal. Secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an

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immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs. The ground of judicial power given to ecclesiastical courts, is, merely, of a spiritual consideration, *pro correctione morum, et pro salute animarum*. They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was always so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law, and judge of the crime, and its proofs: in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office. When the acts of *Henry the eighth* first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, *incidentally*, upon the construction; declared what marriages came within the Levitical degrees, and prohibited the spiritual courts from giving or proceeding upon any other construction. If a man should be indicted for taking a woman by force and marrying her; or for marrying a child without her father's consent; or for a rape,—where the defence is that “the woman is his wife”—in all these cases, the temporal courts are bound to try the prisoner by the rule and course of the common law; and, *incidentally*, to determine what is heretical and what is blasphemous; whether it was a marriage within the statute; a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find, that sentences, in the respective cases, had been given in the spiritual court; and that therefore it should be contended

such sentences were conclusive evidence, in the first instance, without looking into the case,—it would vest the substantial and effective decision, though not the cognizance of the crimes, in the spiritual court; and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a pre-determined conviction or acquittal; which must have the effect of a real prohibition; since it would be in vain to prefer an indictment, where an act of a foreign court shall, at once, seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding. And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; it is equally true, that the temporal courts have the sole and intire cognizance of crimes, which are wholly and altogether temporal in their nature. And if the rule of evidence must be, as it is often declared to be, reciprocal; and that, in all cases, in which sentences, favourable to the prisoner, are to be admitted as conclusive evidence for him, the sentences, if unfavourable to the prisoner, are, in like manner, conclusive evidence against him; in what situation must the prisoner be, whose life, liberty, property, or fame, rests on the judgments of courts, which have no jurisdiction over them in the predicament in which they stand? And in what situation are the Judges of the common law, who must condemn on the word of an ecclesiastical Judge, without exercising any judgment of their own? But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision that there is none), yet a cause of jactitation is of a different nature; it is ranked as a cause of DEFAMATION only, not as a matrimonial cause, unless where the defendant avows a marriage; and whether it continues a matrimo-

nial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and that the bellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of the same or any other marriage in another cause. If such sentence be no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence, from going into new proofs to make out that, or any other marriage. So that admitting the sentence in its full extent and import, it only proves, that it did not YET appear that they were married and not, that they were NOT married at all: and, by the rule laid down by Lord Chief Justice HOLT, such sentence can be no proof of any thing to be inferred by argument from it; therefore it is not to be inferred that there was no marriage at any time or place, because the court had not THEN sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true. It may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that your Lordships may now, unfortunately, find sufficient proof of some marriage. But if it was a direct and decisive sentence upon the point, and, it stands, to be admitted as conclusive evidence upon the court, not to be impeached from within; yet, like other acts of the highest judicial authority, it is impeachable from *without*: although it be not permitted to shew that the court was *mistaken*, it may be shewn that it was *mised*. So that collusion, being a matter extrinsic to the cause, may be imputed by a stranger, tried by a jury and determined by the courts of temporal jurisdiction.

And if fraud will vitiate the judicial acts of the temporal, there seems as much reason to prevent the mischiefs arising from collusion in ecclesiastical courts; which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the courts in Westminster Hall.

AS BASTARDS (who by our law are such children as are not born, either in lawful wedlock, or within a competent time after its determination; or under circumstances, from whence it is concluded that the husband had not access to his wife; or if he had, it was impossible, and even in some cases improbable, that he should answer the ends of procreation) are incapable of being heirs; of having any collateral kindred; consequently can have no legal heirs, but such as claim by lineal descent from themselves; of course the question of *legitimacy* frequently occurs in this action; and whenever it does occur, cannot but be considered as a question of importance.

In a sessions case, on a question of settlement, *Rex v. Inhabitants of St. Peter's in Worcestershire*, where it was²⁵ apparent that the reputed father had never been married, this evidence was admitted in disproof of the marriage; But if for whether he be the legitimate, or only the natural father of the child, he is equally bound to maintain it. So, in a similar case, the evidence of the mother is admissible; but if she be a married woman, she can only be admitted to prove such facts as cannot, in their nature, be proved by any other person; as incontinence, &c. But she ought not to prove the want of access by her husband; for that may be notorious to the whole neighbourhood. And it would be dangerous to encourage a married woman to bastardize her issue, when perhaps the husband may acknowledge their legitimacy.

1. Burr. S. C.

Rex v. Reading or Willey,
Mich. 8. G. 2.
1. Will. 340.

FORMERLY, if a child was born in matrimony, it was not deemed *bastard*, provided the husband was within the *four seas*, though born within a week or a day after marriage. The law is now otherwise. Thus in *Pendrell v. Pendrell*, Lord RAYMOND would not suffer the wife's declaration that she should not know her husband by sight, &c. to be given in evidence, till after she had been produced on the other side; because the fact of marriage was not disputed, but only the legitimacy. It was an issue out of chancery, to try whether the plaintiff was heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*: that at the end of three years, the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. The plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of *no access*. And it was agreed by counsel and counsel, on the trial at *Guildhall*, before Lord Chief Justice RAYMOND, that the old doctrine of being within the *four seas*, was not to take place; but the jury were at liberty to consider of the point of access; which they did, and found against the plaintiff. The Chief Justice allowed the defendant to prove the mother to be a woman of ill fame: but would not allow the mother's declarations to be given in evidence, till she had been called and denied them upon the cross-examination.

Salk. 120.

Cro. Jac. 541.

AND if a jury find the husband had *no access*, the child will be a *bastard*. But where *access* is presumed, as properly may be, in many cases, yet evidence may be given of *inability*, in order to rebut the presumption. Thus in *Lomax v. Holmden*, the marriage being proved

3. P. Wms.
276.

and evidence given of the husband having been frequently in London, where the mother lived, so that access was to be presumed, the defendants were admitted to give evidence of his inability, from a bad habit of body; but as that evidence only went to an *improbability*, and not to an *impossibility*, it was not deemed sufficient, and therefore the plaintiff had a verdict. Stra. 940. Bull. Ni. Pri. 247.

BUT whenever it be established that the husband had *not access*, of course the presumption cannot attach. And as *impossibilities*, when found, will *bastardize* the issue, so, in many cases, even *IMPROBABILITIES* will have the same effect: for which the following authorities may be consulted—*Brasf. l. 1. c. 4. 9. l. 5. fo. 417. Fl. l. 1. c. 15. 4. 5. 7. H. 4. 9. Co. Lit. 244. a. 123. b. Cro. Jac. 541. 1. Rel. Abr. 358. pl. 1. 4. 5. 8. 2. Rel. Abr. 356. Salk. 483.* Str. 51. 1076.

AND where there is a divorce *à mensâ et thoro*, the children born during the separation, will be bastards; for the law will intend due obedience to the sentence, unless the contrary be proved: but if the husband and wife, without such sentence, live separate and apart, the children will be deemed legitimate, till the contrary be shewn; for *access* shall be intended. Yet if a special verdict, as before observed, find that the husband had *not access*, bastardy will attach. And that was the opinion of Lord Hale, in the case of *Dickens v. Collins*. Salk. 123.

AND after the death of a parent, though his general declarations, or an *answer* in chancery, be good evidence to prove that a child was born *before* marriage, yet they are not so, to prove that a child born *in wedlock* is a bastard. Thus in *Stevens v. Moss*, there was a verdict for the plaintiff, and on motion for a new trial, it appeared

that the lessor of the plaintiff claimed to be entitled to the premises, as cousin and heir at law of *Ann Stevens*, who died seised. The only question was, whether the lessor of the plaintiff was the *legitimate* son of *Francis* and *Mary Stevens*, or was born of *Mary* before the marriage. For the plaintiff, the register of the marriage of *Francis Stevens* and *Mary Packer*, dated *November 2d, 1703*, and the register of the birth of the lessor of the plaintiff, in the following words, "*Christenings, 1704, Samuel, son of Francis and Mary Stevens, baptized July 3d,*" were produced. It was insisted for the defendant, "that the lessor of the plaintiff was born and privately baptized before the marriage," and that there was a public baptism after the marriage, which accounted for the register. They first offered witnesses to general declarations by the father and mother that *Samuel*, the lessor of the plaintiff, was born before marriage, which evidence the Judge was of opinion to reject. They also offered evidence, that there was a general reputation in the place where the father, mother and *Samuel* resided, "that he was born before marriage," which the Judge was likewise of opinion to reject. They further offered to produce one *Joseph Dowse* as a witness, to prove that he had heard one *Crips* say many times, "that the lessor of the plaintiff was a base-born child;" which evidence was rejected. And lastly they offered an answer of the mother of the lessor of the plaintiff, to a bill in the court of chancery, by the committee of *Ann* a lunatic, the person last seised, against the lessor of the plaintiff and his mother; in which answer the mother declared him to be *illegitimate*; that he was born before marriage, and privately baptized; and again publicly baptized after marriage: which evidence the Judge was also of opinion to reject. A verdict passed for the plaintiffs, subject to the opinion of the court upon these points of evidence. On shewing cause against the

rule, it was insisted, that though the testimony of parents in their life-time, or their declarations after their decease, might be admissible in cases where proof of the marriage was presumptive only, as by cohabitation, or general reputation; yet neither their declarations, nor their personal testimony, could be admitted to *bastardize* their issue: whereas in this case, the fact of marriage was actually proved: if so, the evidence offered was rightly rejected. In support of the position, several authorities were cited; all of which were only applicable to children born *in wedlock*.—LORD MANSFIELD. “The law of *England* is clear, that the declarations of a father or mother cannot be admitted to *bastardize* the issue born *after* marriage. But here the evidence offered was only to prove *when* the issue was born, and to shew whether it was *before* marriage, or after. The objection goes a great way indeed: it goes to this; that even if the father and mother were alive, their own testimony could not have been received.”—In support of the rule, the fact of marriage was admitted; but it was nevertheless contended, that the evidence offered ought to have been received. That the legitimacy of plaintiff did not depend upon whether *F. Stevens* or a third person was his father, supposing him to have been actually born *in wedlock*; but upon the fact, whether he was born *in wedlock* or *not*. That the register, though evidence of his being the son of *M.* and *F.* was by no means conclusive as to the *time* of the birth. What then was the best evidence the nature of the thing would admit of? Most clearly, the testimony of the parents themselves, if alive; especially of the mother. If so, why are not her declarations to be received after her death? (LORD MANSFIELD. “Suppose the father had entered the day or hour of the child’s birth in a leaf of his bible, would not that have been evidence?”) Most undoubtedly it would. And though there are many dis-

inctions in the books, as to how far an answer, or depositions in one suit, may or may not be read in another, not between the same parties; the mother's answer in chancery was here offered only as a solemn declaration by her in her life-time. That in questions of pedigree, declarations of persons of the family have been frequently admitted. Parents have been examined in court: and in *Rex v. Inhabitants of Reading*, the mother was admitted to prove every thing but want of access, though the child was born in wedlock. LORD MANSFIELD.—It was formerly held, that if the husband was within the four seas at the time the child was born, no evidence could be admitted to prove it was *illegitimate*; but that doctrine was overruled in the case of *Pendrell v. Pendrell*, and from that time the law has been settled the other way. The whole of this evidence has been rejected. If any part of it ought to have been received which is *material*, there ought to be a new trial; and there can be no doubt of its being material. Two questions have been made: 1st, whether the father and mother could have been examined, if alive? 2dly, if they could, whether their declarations, though ever so solemn, can be admitted as evidence after their death? In this case there is evidence of the *fact* of marriage; none of the time of the birth. The register only proves the christening. *non constat* from thence, *when* the child was born. As to the first question, I should as soon have expected to hear it disputed, whether the attesting witnesses to a bond could be admitted to prove the bond. I have known it done over and over again: and it is much too clear to admit of doubt. In this court, at *nisi prius*, a mother was allowed to prove a clandestine marriage at the Fleet, and no other evidence was given, to shew the legitimacy of the child. A great estate was recovered upon her single testimony, and no objection whatever started as to the

Ante, 371.

Ante, 372.

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admissibility of it. In Lord *Valentia's* case, in the House ^{Adjudged} of Lords, where the question was, whether the Earl of ^{22 April 1772.} *Anglesea* was married to the Countess Dowager of *Anglesea* on the 15th of September 1741, prior to the birth of Lord *Valentia* their son, who was born in the year 1744; the Countess Dowager, having no interest, was admitted to prove the *fact* of marriage. In *Stapylton v. Stapylton*, upon ^{About the year 1733.} an issue to try whether the plaintiff was legitimate or not, ^{Vide 1. Atk.} the mother attended at *Guildhall*, to prove he was illegitimate. But it happened that she had made an affidavit, in which she had sworn that she and her husband had been married long before the plaintiff was born; which was intended to have been used against her. Upon this *fact* being known, it was thought prudent not to call her; but there was not an idea on either side, that she was not a proper witness to the *fact* of marriage. As to the time of birth, the father and mother are the *most proper witnesses* to prove it. But it is a rule founded in decency, morality, and policy, that they shall *not* be permitted to say *after* marriage, that they have had no connection, and therefore *the offspring is spurious*; more especially the mother, who is the offending party. That point was solemnly determined at the Delegates: but the question of *access* or *non-access* is totally different from giving evidence of the time of birth. The next question is, whether the declarations of the father or mother, in their lifetime, can be admitted in evidence after *their* death? Tradition is sufficient in point of *pedigree*: circumstances may be proved. For instance; suppose, from the hour of one child's birth to the death of its parent, it has always been treated as *illegitimate*, and another introduced and considered as heir of the family, that would be good evidence. An entry in a father's family bible, *inscription* on a tomb-stone, a *pedigree* hung up in the family mansion (as the Duke of *Buckingham's* was), are all good evidence.

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So the *declarations* of parents in their life-time. I have known advice given to a father and mother to make attested declarations in writing under their hand, of the precise time of the birth of bastard *cigne* and the subsequent marriage, to prevent controversy touching the inheritance. If the credit of such declarations be impeached, it must be left to the jury to decide. As to the declaration made by the mother of the present plaintiff, in her answer to the bill filed against her, it is not like offering a deposition or an answer in evidence against a person, not *party* to the original suit. That cannot be done for this reason; because such person has it not in his power to cross-examine. But here, the answer is offered only as evidence *under her hand*, of having made such declaration. Therefore I am of opinion, that a *part* of the evidence, which was *material* in this case and which ought to have been admitted, was rejected: there must be a new trial."—ASTON, J. I am of the same opinion. I think rejecting the general declaration of the father and mother was *wrong*; and here the declarations are not inconsistent with the register, but are rather strengthened by it. For if the child was born *after* marriage, the mother did not go above eight months.

BUT in no case, not even in *that* of a settlement, can a *wife* be received to give evidence, *tending* to criminate her husband; as was ruled in *The King v. the Inhabitants of Cliviger*. In that case, ASHHURST, J. said: "there is no doubt but husband and wife may prove their own marriage, on a *question of settlement*. This case rests on particular circumstances. A marriage *in fact* had been proved with one woman: the question was, whether she was the pauper's lawful wife. Then another woman was called

called, to prove that she had been before married to him, and was in truth his lawful wife. That creates a doubt, whether it was competent to the wife, to prove that her husband had been twice married. Under these circumstances, I am of opinion that she was *not* a competent witness to that purpose. It has been long established, that the question of *settlement* raises no interest in the parties whose settlement is in dispute, therefore I lay all consideration of interest out of the case. For though the evidence of the woman would have gone to shew that her husband was liable to maintain her, yet that objection would have gone to her credit, not to her competency, because it would have been of no avail on any other trial. But the ground of her *incompetency* arises from a principle of *public policy*, which does *not* permit husband and wife to give evidence that may *even tend* to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime; but even in collateral cases, if their evidence tends that way, it shall not be admitted. Now where the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury, as well as bigamy: so that the *tendency* of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended. In that point of view therefore I am of opinion, her testimony ought *not* to have been received; because it is an established maxim, that husband and wife shall not give evidence to *criminate* each other.—GROSE, In this case the wife was called professedly for the purpose of proving that her husband was guilty of bigamy. The question is, whether she was a *competent* witness to prove that fact. The distinction between com-

petency

petency and credit is by no means accurately settled; in many of the books the shade between them is so light, that the boundaries of either can hardly be perceived. But in all the books which treat of evidence, there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of these relate to husband and wife: and we find the general rule, as to them, to be founded, not on the ground of interest, but of *policy*; by which it is established, that a wife shall *not* be called to give testimony in any degree to *criminate* her husband. And Lord HALE says, she shall not be called even indirectly to criminate him. And that rule seems to have governed all the decisions from that time to the present. The rule is a very proper one, as it tends to prevent dissensions among families. Then what are the circumstances of this case as applicable to that principle? The husband was first called, and asked, whether he had ever been married to this woman? A strange question; to which he might have demurred: however, he answered at once that he never was. Then the same party immediately called his supposed wife to contradict him, and prove him to have been guilty of bigamy. It certainly was not competent to her to prove her husband guilty of the crime of bigamy. The true line upon such occasions is the broad one, according to which a wife shall not be permitted to give any evidence to criminate her husband.

AND it is now admitted that the child of a married woman may be proved to be a bastard, by *other* evidence than that of *non-access* by the husband. Thus, on the trial of an ejectment (*Thompson v. Saul*), the lessor of the plaintiff made out his title as heir at law to John Tilyard, the person last seised, being the nephew of his paternal grandmother. In answer to this the defendants, who

were the tenants on the estate, set up the title of *John Turner Hales*, as being the great-grandson of *Elizabeth Tilyard*, a sister of the paternal grandfather of the said *John Tilyard*, in whom the estate vested by purchase, under a devise, having been originally derived from the said *Elizabeth's* father, *Robert Tilyard*: consequently, that *Hales* had the superior title. The question therefore turned upon the evidence by which he deduced his legitimate descent from *Elizabeth*. As to which, the defendants did not prove any marriage in fact between her and *Joseph Hales*, the great-grandfather of *J. T. Hales*; but produced a pedigree, found in the late *John Tilyard's* house: from whence it appeared, that *Joseph Hales*, the great-grandfather, and the said *Elizabeth* had had issue *Joseph Hales*, through whom the said *J. T. Hales* derived title. And further, that *Robert Tilyard*, the father of *Elizabeth*, in his will, dated 6th November 1714, called her his daughter *Elizabeth Hales*; and several other family wills described the *Hales* as cousins. Some expressions of the late *John Tilyard* were also proved, acknowledging *J. T. Hales* as his heir at law; but it appeared that those as well as the pedigree, took their rise from the passage in the late *Robert Tilyard's* will, wherein he called his daughter *Elizabeth* by the name of *Elizabeth Hales*: and besides, there were similar expressions of acknowledgment from the late *John Tilyard*, as to the heirship of the lessor of the plaintiff. To counteract this evidence, the lessor of the plaintiff proved the marriage of *Elizabeth* in 1705, by her maiden name of *Tilyard*, with one *Simon Kilburn*, with whom she lived in *Norwich* for some time, without having any children; that *Kilburn* then left *Norwich*, after which time she and *Hales* lived publicly together, as man and wife, for some years; during which time that son was born who was stated in the pedigree to be the issue of *Elizabeth* and *Joseph Hales*; and who, it was proved, had always

always been considered in the family as a bastard. When the husband was during that time, did not clearly appear; but a very old witness said, that he went to *London*, where it was supposed he remained, and returned to *Norwich* after his wife's death. It was further proved, that *Joseph Hales* the son, mentioned in the pedigree, always went by that name, except in one instance, where he sold an estate after his mother's death, which had been devised to her by her father *Robert Tilyard*, and in the title-deeds styled himself "*Joseph Kilburn*, otherwise "*Hales*;" and his descendants always went by the name of *Hales*. It was also proved that *Elizabeth* was buried by the name of *Kilburn*. The fact of her marriage with *Kilburn* being thus clearly established, the defendant's counsel then changed their ground, and contended for the right of *J. T. Hales*, as having descended from that marriage; for that unless *non-access* of the husband were clearly proved, which had not been, nor could be done at that distance of time, it must be taken that *Joseph* the son, whatever his reasons might have been for taking the name of *Hales*, must, in point of law, be taken to be the son of *Kilburn*, and could not be bastardised by mere evidence that another person had cohabited with his mother from whom he claimed. The Judge directed the jury to that effect, telling them, that though it was *not* absolutely necessary to prove the husband out of the realm, in order to bastardize the issue, yet it was incumbent on the party insisting upon that fact, to prove the husband could not, by any probability, have had access to his wife at that time; which, he conceived, had *not* been shewn, in the present instance: whereupon the jury found a verdict for the defendants. To set aside which a rule was obtained, on the ground that the circumstances given in evidence at the trial, were fully sufficient to prove the bastardy of *Joseph Hales*, upon whose right the defend-

was founded; and that it was not indispensibly necessary to prove *that* by no possibility could the husband have had access to his wife. The will of the father, *Robert Tilyard*, in which he called his daughter *Elizabeth Hales*, the notoriety of *Hales'* cohabitation with her, the probability of the husband's absence during the time, the reputation in the family of the son being a bastard, and the circumstance of his and his posterity having adopted the name of the putative father, all together formed ample grounds for the jury to draw the conclusion of his illegitimacy.—*ASHHURST, J.* after consultation with the rest of the court, said, that he was of opinion there ought to be a new trial. He added, that he was convinced he had laid too much stress on the necessity of proving *non-access*, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife. That the husband, in this case, left the wife, and went to reside at another place, as it was believed in *London*; and that there was no direct evidence of access, he observed, was very clear: and then there were other circumstances which went strongly to rebut the presumption of access, and to shew that the son was a bastard; among others a very forcible one occurred, that the son having taken a different name from his birth, the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since: which was a very strong family recognition of his illegitimacy.—Rule absolute for a new trial, without costs.

It is a general principle, that if a child be born so long after the death of the husband that it could *not* be his, it will be deemed bastard. The law has not however, will appear hereafter (nor could with propriety, *physical* facts considered), *precisely* ascertained what length of time

1. Rel. Abg.
356. 1. 10. 40.

time a woman is to go with child, after her husband's death, so as either to *legitimate*, or bastardize the issue. Even the *faculty*, who are most conversant with, differ widely on the subject. They in general agree, that a *legitimate* (applying the term as used in common parlance) *delivery* is that which happens at the just term, *i. e.* in the *tenth lunar month*; and that *that* is *illegitimate*, which comes either sooner or later; as in the *eighth*, or after the *tenth*. *Huffman* says, the usual time of gestation is *nine solar months*. *Junker* is of opinion, that the natural time of *delivery* is in the *fortieth week*, from the first suppression of the *menfes*; or the *twentieth*, or *twenty-first*, from the time when the motion of the *fætus* is first perceived. Women are indeed delivered at *seven*, *eight*, *nine*, *ten*, and *eleven months*, but not later: though some physicians have held, that a delivery may be regular in the *fourteenth month*. *Mons. Peyssonnel*, a physician of *Lyons*, composed a treatise in Latin on the term of *delivery*; wherein he undertakes to reconcile all the apparent contradictions of *Hippocrates* respecting it. He holds, that the *shortest term* of *legitimate birth*, according to *Hippocrates* is *182 days*, or *six complete months*; and the *longest*, *250 days*, or *nine months and ten days*; and that children who come earlier or later, do not live, or are not *legitimate*.

Co. Lit. 123. b.
Palm. 9.
Godb. 281.

2. Cro. 547.
3. Rol. Abr.
956. l. 10.

Co. Lit. 8.
1. Rol. 357.
l. 10.

Palm. 10.

By ancient legal authorities it is agreed, that a *posthumous child* shall not be bastard, if born within *forty weeks* after death of the husband: or within a few days after the *forty weeks*, if it can be proved, by *circumstances*, to be the issue of the husband. If therefore the widow marry a *second husband* *presently* after the death of the first, it may, according to the circumstances of the case, be a child of the one or the other; for if born above *forty weeks* after the death of the first husband, it shall be

child of the second; but if within seven months after,
shall be the child of the first. The text of Sir Edward
Coke, above referred to, is—“It was found by verdict, that Co.Lit. 123.b.

Henry, the son of Beatrice, which was the wife of Robert
Radwell deceased, was born *per undecim dies post ultimum*
tempus legitimum mulieribus constitutum. And thereupon
it was adjudged, *quod dictus Henricus dici non debet filius*
predicti Roberti secundum legem et consuetudinem Angliae
constitutus. Now *legitimum tempus* in that case appollated
by law, at the furthest, is nine months or forty weeks;
but she may be delivered before that time; which judg-
ment I thought good to mention; and this agreeth
with that in *Esdras*,—*Vade et interroga pragnantem, si* 1. Esd. c. 4.
quando impleverit novem menses suos, adhuc poterit matrem 7. 40, 41.
ejus retinere partum in semetipsa? Dixi, non potest, domine.”

THIS position of Sir Edward Coke is upon principle
and authority much questioned, in truth considerably
taken, by Mr. Hargrave, who has investigated the point
with great ability, in an elaborate comment which he has
written upon it: a comment which I shall take the liberty
to state in his own words, from the fear of doing in-
justice to his sentiments.

LORD HALE (says Mr. Hargrave), in a note on a
page about legitimacy, gives a fuller extract of this
from the record than is here expressed. His words
are: “Trin. 18. E. 1. coram rege Rot. 13. Bedford; et M.
23. E. 1. Rot. 2. in assize by John Radwell against
Henry, son of Beatrice, who was wife of Robert Radwell, Hale, MSS.
comperit, quod dictus Henricus fuit natus per 11
post 40 septimanas, quod tempus est usitatum mulieribus
gravidis, ex quo predictus Robertus non habuit accessum ad
dictam Beatricem per unum mensem ante mortem suam,
consequitur dictum Henricum esse bastardum, ideo, judgment

for the plaintiff. If this state of the case be correct, *Lord Coke's* is erroneous in several particulars of consequence. 1. He is short in not expressing, that the record mentions forty weeks, and so leaving it to be deduced an inference of his own, as which it has accordingly been treated. 2. He exceeds the record, by representing it to stile that time *the latest* for a woman going with child, when the record only calls it the *usual* period. 3. He wholly omits the husband having had no access to the wife, for one month before his death, a fact very material; it being very easy to allow eleven days after the usual time, but requiring a strong case to warrant extending such liberality to nearly six weeks. 4. The word *presumptur*, which *Lord Coke* passes over, is of importance for it indicates, that notwithstanding the great excess of time, it was conceived to create only a *presumption* for the bastardy; consequently, if very cogent circumstances, to account for the protraction of the birth, and in favour of the wife's chastity, had occurred, the judgment might have been for the legitimacy. So far we had advanced when on looking into *Rolle's Abridgment*, we found the same ancient case of *Radwell* more at large, than either *Lord Coke* or *Lord Hale*. But *Rolle* agrees with the former as well in respect to the record not mentioning the forty weeks, as to its stating the birth to be eleven days after the *latest* time in law for a woman going with child; and as from *Rolle's* particularity, he seems to have most accurately attended to the record, his authority, till the whole record appears, seems most decisive. However, the last particulars, in which *Lord Coke* differs from *Lord Hale* still remain; to which *Rolle* adds these further circumstances: that the husband languished of a fever a long time before his death; that on taking an inquisition afterwards in the court of a lord, of whom he held lands in knight's service, the wife swore she was not pregnant;

1. Rol. Abr.
356, 357.

to prove it, uncovered herself in open court: that, in consequence of all this, the lord received a collateral relation as heir. The words describing the wife's exposure of her person, are remarkable; for the record states, that she being interrogated *juramento afferebat se non esse pregnantem, et ut hoc omnibus manifestè liqueret, vestes suas ad tunicam exuebat, et in plena curia sic se videri permisit.*

"It reflects great discredit on the lord's court (continues Mr. H. whose delicacy seems offended at the circumstance), which permitted such a gross indecency; and still more on the king's judges, who suffered it to be recorded as one of the grounds for a verdict before them. How laudably contrariant is the proceeding on the writ *de ventre inspiciendo*. This remedy for the heir against the pretence of pregnancy, so well known to be of earlier date than the reign of *Edward the first*, as it was framed in the times of *Bracton*, *Britten*, and *Fleta*, delicately requires the widow to be inspected by a jury of her own sex; and though in subsequent times, the sheriff was ordered to summon a jury composed both of men and women, yet still the search was to be made by the latter only. What harsh ideas of the times might we be led to adopt, if the early introduction of the writ *de ventre inspiciendo* did not demonstrate, that the unseemly record now are observing upon, was a singularity; and so many other testimonies of a more advanced refinement in judicial proceedings did not concur, to rescue the age of our English Justinian from the suspicion of a general practice of such barbarism. Let us then suppose the record to be as it is in *Rolls*, which is more probable to be the truth; because a contemporary Judge, who reports its having been produced on a trial of legitimacy, represents it much in the same way. But still it will not warrant Lord Coke inferring from it, that *forty weeks* constitute the

Brac. 69. a.
Brit. 165. b.
Flet. lib. 1.
c. 15.
Reg. 227. a.

Cro. Jac. 344.

latest time our law allows for a woman going with child. On the contrary, no particular time being mentioned, the period meant must be found out through some other medium; and as the record states other unfavourable circumstances, besides the excess of time, and that the jury presumed against the child being the issue of the deceased husband, it seems fair to suppose, that the law was understood not to be so strict in the time alluded to, whatever that time might be, as indiscriminately to condemn as illegitimate, all children not born within it; but rather to consider every excess, unless very extraordinary indeed, as only raising a presumption against them. This construction is clearly most consistent with the terms of the record in question. After the case of *Radwelly*, Lord Hale gives the four following cases. *Rot. parl. 9. E. 2. M. 4.* Gilbert de Clare comes Glouc. obiit 30 Janii, 7. E. 2. in parlamento tenuit. quindena Hil. 9. E. 2. the sisters and coheirs pray livery. *Matilda, quæ fuit uxor comitis*, pretends to be big by the Earl, which was accordingly found *per inquisitionem*. The coheirs reply, that *si comitissa prægnans esset, tantum tempus elapsum est, ut secundum cursum pariendi non possit dici imprægnari à comite*: yet they could not obtain livery till *Pasch. 10. E. 2.* but the question hung in deliberation. Note 18. R. 2. where a woman in such a case, immediately after the death of the first husband, took a second husband, and had issue born *forty weeks and eleven days* after the death of the first husband, and it was held to be the issue of the second husband. *M. 17. Jac. B. R. Alfep v. Stacey.* Andrews dies of the plague. His wife, who was a lewd woman, is delivered of a child *forty weeks and ten days* after the death of the husband: yet the child was adjudged legitimate, and heir to Andrews; for *partus potest protrahi ten days ex accidente.* *M. 4. Car. in Cur. Ward.* and afterwards *P. 5. Car. B. R. Thecar* marries a lewd woman, but she doth not cohabit with him, and is sub-

pected

pected of incontinency with *Duncomb*; *Thecar* dies; *Duncomb*, within three weeks after the death of *Thecar*, marries her; *two hundred and eighty-one days and sixteen hours* after his death, she is delivered of a son. Here it was agreed, 1. If she had not married *Duncomb*, without question, the issue should not be a bastard, but should be adjudged the son of *Thecar*. 2. No averment shall be received that *Thecar* did not cohabit with the wife. 3. Though it is possible, that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of *Thecar*. *Lord Hale's* case of *E. 2.* appears very extraordinary; the time from 30th *June*, 7. *E. 2.* when the *Earl of Gloucester* died, to the *quindene* of *Hilary*, or 29th *Jan.* 9. *E. 2.* when the livery to his sister was further postponed in parliament, being within one day of a year and seven months; which is a much later date for delivery of a live child, than the most liberal in their calculations have hitherto assigned. However, on reading the printed copy of the original record, in the rolls of Rot. Par. 1. v. 353. parliament lately published, we find *Lord Hale's* note quite accurate. As to the case of *R. 2.* it confirms the doubt we have elsewhere stated of the opinion, that if a widow marries again and has a child within nine months after the death of the first husband, the child may choose his father; and is an authority for deciding according to the proof of the woman's condition when her first husband died. *Lord Hale's* two other cases are reported in several books; *Alfop v. Stacey* being in *Cro. Jam.* 541. *Godb.* 281. *Palm.* 9. 1. *Ro. Abr.* 356. and *Thecar's*, in *Dr. Jac.* 685. *Winch.* 71. *Litt. Rep.* 177.

"If our law (continues *Mr. H.*) was really as strict at a point of time, it would not sufficiently conform to the course of nature. Physicians, it is true, generally call

nine months, each being of thirty days, the usual period for a woman going with child; but then they allow, that as a delivery may be accelerated by accidental causes, so it is frequently protracted, not only for *ten days* beyond the nine months, but to the end of the tenth month, and sometimes for a considerably longer time. Justice therefore requires, that in the case of *posthumous* children, an excess of the usual time should not operate further, than by raising a proportional presumption against the legitimacy. The Roman law was very liberal in this respect; for the *Decemviri* allowed, that a child may be born in the tenth month; and though a law of the Digest excludes the eleventh, yet the emperor *Adrian*, after consulting with the philosophers and physicians, decreed even for this, where the mother was of good and chaste manners. A like liberal discretion probably prevails in most countries of Europe; for an instance of which, we appeal to a writer of great authority, who reports a decision by a majority of Judges in the supreme court of *Friesland*, by which a child was admitted to the succession, though not born till *three hundred and thirty-three days* from the day of the husband's death; which period wants only three days of twelve lunar months. *Sand. Decis. lib. 4. tit. 8. Definit. 19.* Nor will our own law, notwithstanding what *Lord Coke* advances, if the authorities are duly collected and considered, be found deficient on this interesting subject. Indeed, there is a passage in *Britton* which gives countenance to *Lord Coke's* limitation of forty weeks; for this writer excludes from the inheritance *posthumous* children not born *within* forty weeks from the husband's death. However, even this writer seems to extend in some degree beyond the forty weeks; unless he meant to make the wife's conception exactly of equal date with the husband's death, which surely is not a very reasonable construction. But, without dwelling on such a nicety,

Brit. 166. 2.

is sufficient that the principal of the few other authorities in our books are against so rigid a rule. *Braddon* is very cautious, illegitimizing only the issue born so long after the husband's death, as to create an *improbability* of its being his child, without naming any fixed period. As to the determined cases, the only authorities of this sort we meet with, are enumerated in the preceding annotation; and these, duly weighed, will not be found, it is apprehended, to warrant *Lord Coke's* conclusion. In *Radwell's* case, the finding against the issue is expressed to have been grounded merely on *presumption*; besides, if we construe the record properly, the presumption arose from proof of the husband's *non-access* to the wife, for a *month* before his death. The case 9. E. 2. is an instance of allowing so much time beyond forty weeks, that it seems too strong to have much weight; but so far as it can claim any, it counts against *Lord Coke*. The case 18. Rich. 2. at first seems full for *Lord Coke's* rule; the child, though born only eleven days beyond the forty weeks, having been declared *not* the issue of the deceased. But when it is further considered, there will be found nothing to prove a positive general rule, for it was very special; the widow having married a second husband the day after the death of the first: so that the question was not of legitimacy, but merely to which husband the issue belonged. One of the two only remaining cases considerably extends the time beyond forty weeks; for in *Alfop v. Stacey* (the first of them), the issue was found *legitimate*, notwithstanding the lapse of forty weeks and ten days, and the lewd character of the wife: and even as to *Thecar's* case (which is the other of them), the issue having been born after the lapse of two hundred eighty-two days, there was an excess of the forty weeks, though but a trifling one. The precedents therefore, so far from corroborating *Lord Coke's* limitation of the *ultimum tempus pariendi*, do, upon the whole, rather tend to shew, that it

hath been the practice in our courts to consider forty weeks merely as the more usual time; consequently not to decline exercising a discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have so required. In the course of our enquiries (concludes *Mr. H.*) into the subject of this note, we were curious to know the general sentiments of that eminent anatomist *Dr. Hunter*, on three interesting questions. These were, what is the usual period for a woman going with child? what is the earliest time for a child being born alive? and what the latest? The answer, which he returned, was expressed in the words following: 1. The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks. 2. A child may be born alive at any time from three months; but we see none born with powers of coming to manhood, or being reared, before seven calendar months, or near that time; at six months it cannot be. 3. I have known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months, and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception."

Cro, Jac. 541. THE case mentioned by *Lord Hale*, as *Alfop v. Stacey*, is well reported by *Sir George Croke*, under the name of *Alfop v. Bowtrell*. There the husband died the 23d of March, and the child was born the 5th of January following; and, under circumstances, was adjudged legitimate,

HAVING said thus much on the subject of evidence, it remains only to add, that when each party has given evidence in support of his case, the plaintiff's counsel is in general intitled to animadvert on the whole case, by what

in the profession is termed a *reply*, to the jury. But in the case of *Revett v. Brabam*, at the outset of the cause, a question arose, who was entitled to the *general reply*? The court decided, that if the plaintiff proved his pedigree, and stopped; and the defendant set up a *new case*, which the plaintiff answered by evidence, which ultimately went to the jury; the *defendant* should have the *general reply*; and BULLER, J. said, that he had so ruled it in a case at *Winchester, Farr v. Hicks*. 4 T. Rep. 497. Anst. 357.

Sum. Assizes,
1782.

AFTER verdict, the successful party is, of course, entitled to the judgment of the court; but four days notice must first be given to the other party; within which time, if there was any defect of justice at the trial, by surprise, inadvertence, misconduct, or misdirection, the court, on proper application, will *suspend* the judgment, and grant a **NEW TRIAL**.

TRIALS by jury, in civil causes, could not now subsist, without a power somewhere to grant *new trials*; for a *general verdict* can only be set right by a *new trial*: which is no more than having the cause more deliberately considered by another jury, when there is a reasonable doubt, or perhaps a certainty, that justice has not been done. The writ of *attaint* is now a mere sound in every case; in any it is not pretended to be a remedy. There are numerous causes of false verdicts, without any bad intention in the jurors. They may have heard too much of the matter before trial; may have imbibed prejudices, without knowing it; the cause may be intricate; the examination may be so long as to distract and confound attention. Most *general verdicts* include legal consequences, as well as propositions of fact; in drawing which *confusion* the jury may mistake, and infer directly contrary law. Parties may be surprized by a case falsely made

1. Bur. 393.
1. Blac. 464.

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at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive, the determination of civil property in this mode of trial, would be very precarious and unsatisfactory. It is therefore absolutely necessary to justice, that there should, upon many occasions, be opportunities of re-considering the cause by a new trial. It is not true, "that no new trials were granted before 1655." The reason why it cannot be traced further back, is, "that the old Report Books do not give any accounts of determinations made by the court upon motions." Indeed for some time after that period, the granting of new trials was holden to a degree of strictness so intolerable, that it drove the parties into a court of equity, to have in effect a new trial at law of a mere legal question; because the verdict, in *justice*, under all the circumstances, ought not to conclude. Many bills have been retained upon this ground; and the question tried over again at law, under the direction of a court of equity. Of late years therefore courts of law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by LORD PARKER, in the case of *The Queen v. Corporation of Helston*, seems to be the best general rule which can be laid down upon the subject, viz. "doing justice to the party;" or, in other words, "attaining the justice of the case." The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances. Of late years, new trials have been granted not only after trials at *nisi prius*, but also after trials at bar. And it is at least equally reasonable to do it after trials at bar, as after trials at *nisi prius*, if the justice of the case demands it; or, indeed, rather more so, as the latter mode

Stylar 466.

Lucas Rep.
302.

And. 315.
Stra. 1105.

done upon what could have appeared to a single Judge only, whereas the former is grounded on what must have manifestly appeared to the whole court.

MOTIONS for new trials are much encouraged; for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind; and the court and the counsel are enabled to consider the question more fully, than they could do in the hurry of business at *nisi prius*. But there is a wide difference between the reasons which ought to induce the court to grant such rules, and those which are sufficient to grant *new trials*.

1. T. Rep. 110.

In a motion for a new trial, the general question is, *Id.* 159.

Whether the verdict be supported by the evidence? And in a *burd* action, where there is something on which the jury have raised a *presumption*, consistent with the justice of the case, the courts make it a general rule not to interfere, by granting a new trial, provided the objection does not lie in point of *law*. For if the verdict be consistent with justice, the court ought *not* to grant a new trial.

4. T. Rep. 469.

And in *Deerly v. Ducheſs of Mazarine*, the court refused Salk. 116. 646.

to grant a new trial, even though the verdict was *against* law. Certainly the application is an application to the discretion of the court, who will of course exercise it only as best to forward the ends of justice; if therefore, on motion for a new trial, on the ground of *misdirection* in point of law, it be manifest that justice has nevertheless been done between the parties, the court will neither set aside the verdict, nor discuss the question of law.

1. T. Rep. 46.

It does not follow by necessary consequence, that there must always be a new trial granted, where the verdict is contrary to evidence: for it is possible that the verdict

1. Burr. 669.

may

2. Wils. 307. may nevertheless be on the side of the real justice of the case; of which there are several instances in the
2. Salk. 646. Books, particularly the *Duebels of Mazzarini's* case. And
2. Burr. 936. even though the ground of the verdict be wrong, yet it clearly appear, that upon the whole no injustice has been done; or that the plaintiff, by another form of action, could recover all he has gotten by the verdict; the court ought not to grant a new trial: but if injustice be done by the verdict, and it be not clear that the plaintiff might have equal redress, and recover as much, by another form of action, then it ought to grant a new trial. And
1. Wils. 27. where, on the motion for a new trial, the Judge certifies that six witnesses were examined on each side; that the jury found for the defendant, which was against his opinion; but that he could not take upon himself to say that the verdict was against evidence, because there was evidence on both sides; a new trial was refused. So
- Id.* 57. *cestui que trust* bring an ejectment against a wrong-doer, and the jury find for him, the court will not set it aside because of the final justice of the case. And new trials
- Id.* 98. are never granted, where it appears that the applicant might have produced and given material evidence at the trial, if it had not been his own fault; for it would tend to introduce perjury, and there would be no end to litigation, if once such an application was countenanced.
2. Wils. 306. So when the defendant has obtained a verdict, in a bar action, the court will not grant a new trial. There are
3. Wils. 39. however cases in which the court will grant new trials notwithstanding evidence was given on both sides; where all the necessary information was not afforded at the trial, which might and ought to have been. When verdicts are given contrary to evidence, or there has not been any evidence to support the verdict, the courts have granted new trials; but if there be *contrariety* of evidence on both sides, the courts, in general, will not grant a new trial.

al, even though the Judge, before whom the cause was
 ed, should be of opinion, that the weight of evidence
 reponderated against the verdict. Under such circum-
 nces, the courts disclaim any power to controul the ver-
 ct, the jury being the legal constitutional judges of the
 ct. Even the suggestion of *surprize* is not, in all cases, 1. Blac. 298.
 reason for a new trial, though under particular circum-
 nces it may. So, if no further information can be ob- *Id.* 418.
 ned, a new trial will not be granted. Or, if the de- 1. Black. 803.
 dant might have given evidence, which at the trial it
 eared prudent to omit; that never was ground for a
 w trial. Scarcely a case happens, where evidence, of
 ne kind or other, is not, in discretion, kept back; and
 ould be of fatal consequence, to afford to the parties
 opportunity of introducing new evidence when they see
 ere the cause presses. So, if there be a *bill of exceptions*, *Id.* 919.
 ew trial will not be granted, to discuss the point of law
 which the *bill* is founded. The bill of exceptions
 dained by the Legislature) is in the nature of a writ of
 or; and it would be highly improper to stop that *in*
stitu, unless the party waive the bill of exceptions.
 an objection to the competency of witnesses discovered 1. T. Rep. 717.
 r trial, is not of itself a sufficient ground for the grant-
 of a new trial; though, provided the application hap-
wise merits to recommend it, it might possibly have
 weight with the court. In truth, there does not
 ap exist an instance of a new trial being granted on
 an allegation; and it would be highly dangerous to
 blish such a precedent. But the discovery of new 1. Blac. 955.
 ence, by the attorney of an executor defendant (ab-
 from *England*), though in the actual custody of the
 ey himself, yet not known by him so to have been
 e time, has been deemed ground for a new trial
 e however there are two *contrary* verdicts, and the
 is *satisfactory* to the court, the losing party is not
 intitled,

Id. 563.
2. P. Wms.
563.
2. Atk. 378.

intended, by any rule or practice, to a *third* trial. There is no such rule at law, nor even in equity.

BUT this mean of attaining the ends of justice, was not heretofore countenanced in the action of *ejectment*; because the injured party might bring a new *ejectment*. But as the courts became more liberal, they adopted the practice, and granted new trials in *ejectment* (as well in other actions), where the party applying would suffer by a change of possession; as where the plaintiff has obtained a verdict, it makes a great difference to the defendant, whether he has a new trial, or is forced to become plaintiff in a new *ejectment*. *Ejectments* are substituted in the place of real actions, in which the title appeared upon the pleadings, and, of course, gave no room for surprise. "We should therefore" (said LORD MANSFIELD, in the case of *Clymer v. Littler*) "rather lean to new trials on behalf of defendants, in the case of *ejectments*, especially on the footing of surprise."

2. Black. 342.

AFTER a new trial has been granted, the court will in general, permit any amendment to be made in the record; the intent of a new trial being to submit the question to the consideration of another jury. In case of an *ejectment*, the court might relax the rule. Whatever favour it may be disposed to shew, on an application for a new trial in *ejectment*, it should always be remembered, that, on such an application, the material question must be, whether, under all the circumstances, the verdict be, or be not, according to justice; for though the Judge may have made some trifling slip in his directions to the jury, yet, if justice be done by the verdict, the court ought not to interfere. If indeed the facts be doubtful, and the attention of the jury has been drawn from the consideration of them, that is ground for a

2. Blac. 923.

3. T. Rep. 420.

trial: but if the facts be clear, and have been stated to the jury, the court ought not to grant a new trial, in order to give the unsuccessful party the chance of obtaining a verdict; provided (as before observed) the former one be agreeable to the equity and conscience of the case. Nor will the court grant a new trial, merely because the subject litigated is of *value and importance*, unless there be *some serious doubt* in the question; nor perhaps to let the party applying into a defence of which he was apprized at the trial. Were the party, who has a defence, which he knows is necessary to be established at the trial; but, neglecting to make use of it, relies upon another, in which he fails, permitted to avail himself of the first, as ground for a new trial, it would be a great inlet to perjury, and therefore such an application would no doubt be cautiously admitted.

BUT though new trials may be granted in ejectment, 3. Burr. 1233. if the circumstances of the case justify it, yet it is not every slip or mistake that will be admitted as a ground for it, and more especially if no injustice be done.

IX. *The judgment, and its incidents; and, herein, of the costs.*

IN this action, the plaintiff does not recover the freehold; he recovers *only* POSSESSION of the land: execution is of the possession only. Hence it may be asked, how he becomes *seised* according to his title? To which it may be answered, that when a person is in possession by title (as every one is, who enters in execution of a judgment in ejectment, because the law does no wrong), the possession

possession and the title unite. It is a rule of law, that when a man, having title to an estate, comes to the possession of it *by lawful means*, he shall be in possession according to his title; as where the title is to have a fee, he becomes seised in fee; where the title is to have an estate-tail, he becomes seised of an estate-tail; and so on; the law casting the estate upon him according to his title. Were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates, and would never answer the purpose for which it was brought into use, if the lessor of the plaintiff had no more than bare possession, after an execution or entry on a judgment in ejectment. The greatest absurdity would follow were it otherwise; for one might have a rightful possession with an immediate remainder to himself in tail; a notion which never existed, till (as was said in argument) the case of *Atkyns v. Horde* came to be debated. Recognizing this doctrine, LORD MANSFIELD, in his judgment on that case, says, "suppose the proceeding (as it is) a fictitious remedy; then in truth and substance a judgment in ejectment is a recovery of the possession (not of the seisin or freehold), without prejudice to the right, if it may afterwards appear, even between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder: if he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures according to his right. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits."

1. Burr. 60.

1. Burr. 114.

A JUDGMENT is an act of law; while it continues in force, it destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered

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reversed, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoveror. Were it not to produce that effect, the lessor of the plaintiff could neither enter, nor be intitled to the writ of *habere facias possessionem*: but having a right to enter, and sue out that writ, infers his right to the possession. Whilst the judgment stands in force, it removes an intervening estate out of the way; during which time it is the same as if it had never existed: and the recoveror's right to the possession will continue, till the judgment be reversed, or falsified in another action. Like the case where tenant *in tail* suffers an erroneous recovery, so long as the recovery remains in force, it is a bar to the *tail*, and the issue *in tail* has no right to the estate-tail: nor if tenant *in tail* should *disseise* the recoveror, and die, the issue would not be remitted; because he has but one title to the land (which is by descent), and there must be Co.Lit. 349 a. two titles in the same person, to make a remitter. And by any intendment a judgment in ejectment, *after verdict*, can be supported, the court will certainly sustain

1. Willf. 1.
Morris v.
Barry,
ante, 212.

THE verdict, being the ground of the judgment, ought not to be entered for more land, or for different parcels, than the defendant was found guilty of by the verdict. Yet a variance between the verdict and judgment, occasioned by the misprision or default of the clerk entering the judgment, is not fatal, but may be amended by the court even after a writ of error brought. As where the plaintiff had judgment, *quod recuperet terminum* of a Cro. Jac. 631. messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land; though the judgment was larger than the verdict, yet it was amended, because the variance arose from misprision of the clerk, who had not followed the verdict, which ought to have been his guide

in making up the judgment, and no mistake in point of law, in giving the judgment. And the party ought not to suffer for the clerk's misprision, since the statute 8. H. 6. c. 12. gives the Judges, in affirmance of the judgment, power to amend and reform what, in their discretion, seems to be the misprision of their clerks.

THE judgment in ejectment is either against the casual ejector, or against the tenant, upon a verdict: the former is generally before, the latter always after, an appearance.

WHERE there is a verdict, the judgment may be considered, either, where it is for the whole, or for part only of the premises demanded by the action; or, where there are several defendants or plaintiffs, and one of them dies.

JUDGMENT against the casual ejector, is entered in three following cases: 1. where there is no appearance. 2. where the landlord defends alone, instead of the tenant. 3. where the tenant, having appeared, refuses at the trial to confess lease, entry, and ouster.

WHERE there is not any appearance (which may be known by searching the Judges books in the king's bench, and the prothonotary's plea-book in the common pleas) the plaintiff must draw up a rule for judgment with the clerk of the rules in the former, and the secondary in the latter court; and then make an *incipitur* of the declaration on a double half-crown stamp, and also on a roll of the Term: these he must carry to the clerk of the judgment in the king's bench, and to the prothonotary in the common pleas, who, on seeing the rule for judgment, will sign it accordingly. But in the common pleas, the plaintiff must make out a warrant of attorney for the defendant.

defendant; and carry it, with the other papers, to the prothonotary, when he signs the judgment.

If judgment be signed against the casual ejector, and it be made appear that no declaration was regularly served, the court will set it aside. Also, where judgment has been obtained against the casual ejector, but no trial lost, the court will (on payment of costs, and the tenant entering into the common rule to confess lease, &c.) set aside the judgment, as in other actions; and not put the tenant to the charge and hazard of recovering back possession by another action.

SECONDLY, where the landlord defends alone, instead of the tenant, judgment must be entered against the casual ejector; that the plaintiff, after having tried his case against the landlord and succeeded, may have the benefit of his verdict, and obtain possession under the judgment against the casual ejector, which, under such verdict, he could not. Barnes 410
edit. 179.

THIRDLY, where the tenant, having appeared, refuses, 1. Keb. 249. the trial, to confess lease, entry, and ouster, the judgment against the casual ejector cannot be entered till the case be returned, on which is indorsed, that the nonsuit was for want of confessing lease, &c.: for it does not appear that the defendant has not complied with the rule, after the affizes at which the cause was to have been tried; therefore the judgment cannot be entered till the next Term after such affizes. But see ante,
242, 243.

WHERE the plaintiff hath a verdict for the whole, or part only, of the thing demanded.

IF the plaintiff obtain a verdict for the whole, the entry of the judgment is, that the plaintiff *recuperet terminum versus defendentem de et in tenementis prædictis et quod defendens capiatur*. The first judgment of this kind seems to have been about 14. Hen. 7. For originally the plaintiff recovered only damages in this action; because tithes for years were so entirely, at common law, in the power of the freeholder, that they were generally short, and often expired before the suit could be determined: about the reign of Hen. 7. they began to extend to great length, which necessarily and in reason altered the judgment. The remedy would not have been commensurate to the injury, if the plaintiff could only have recovered damages, when he had made out his title to a term, which, upon the face of the record, must appear to the court to be subsisting: hence the judgment was, *recuperet terminum*.

Cro. El. 144. BUT if the judgment be entered, *quod recuperet possessionem termini prædicti*, this is as operative as if it had been *recuperet terminum prædictum*; because both signify the same thing, and the possession only is to be recovered on the term. Co. Lit. 285. *habere facias possessionem*. Hence, if the term expire during the suit, the plaintiff cannot recover the possession. 3. Mod. 249. because the court cannot give judgment for the land, when it appears on the face of the record that the title to the land is determined: yet he shall have judgment for damages, because the trespass remains as before.

Lil. Pr. Reg. 503. As if an ejectment be brought, and the demise be for the 1st day of *October*, when the plaintiff has title to the land, suppose an estate for another's life, and the 1st of *January* *cestuy que vie* dies, when the title appears to be in the defendant, the plaintiff may proceed in the action, and recover his damages, though not the possession: be-

THAT must belong to the defendant. The plaintiff is entitled to damages, because the defendant unjustly withheld possession at the time the action was brought,

If the plaintiff has a verdict only for part, as for Judgment Book 72, 3, instance, where he declares of an ejectment in *D.* and *L.* and the jury find the defendant guilty in *D.* only, the judgment is, *quòd recuperet terminum in D. et quòd defendens capiatur*; but for the other part, whereof the jury acquitted the defendant, the judgment is, *quòd querens sit in miseria, et quòd defendens eat inde sine die.*

WHEN the defendant was found guilty, the entry used to be, *quòd defendens capiatur*; because the ejectment being a trespass *vi et armis*, which is a breach of the peace, the person who was found guilty, used to pay a fine to the king, for which, at common law, a *capias pro fine* issued. This process being abused by the officers, who would outlaw the defendant thereon, unless he compounded for the fine, which was uncertain in its nature; and the crown itself receiving not any benefit from the fines, inasmuch as they were never estreated into the exchequer;—to prevent the abuse, therefore, this process was taken away by statute. The plaintiff is now to pay the officer, in lieu of the fine, the sum of six shillings and eight-pence, which is allowed the plaintiff in costs.

In the case of *Lindsey* and Sir *John Clerk*, the plaintiff had a verdict in ejectment upon an original in *B. R.* and a writ of error was brought in parliament: to prevent error, it was moved to have the opinion of the Judges, upon the fifth and sixth of *Will. & Mary*, which takes away the *capias pro fine* in cases of this nature; “whether since that statute any judgment, *quòd defendens capiatur*, ought to be entered on record in judgments on actions

vi et armis, &c. or whether any other special entry ought to be made in lieu thereof, taking notice of that statute. After debate it was held, that the statute having taken away the fine, no judgment of *capiatur* should be entered against the defendant, nor any thing in lieu thereof, but the clause should be totally omitted in the judgment.

Cro. Car. 406. AND formerly, in an ejectment against baron and feme, the husband was acquitted, and the wife found guilty, the judgment was *quod capiantur*, and held good; because that was only for the fine, which the husband should pay, as the wife could not.

Cro. Car. 172. "QUOD querens sit in misericordiâ pro falso clamore," is not peculiar to this action, and therefore need not be insisted on; but if the plaintiff declare against three, or several parcels, one be acquitted of all, and the other two of part, but found guilty of the residue, it need not be twice entered that the plaintiff is in *misericordiâ*; that is once: *pro falso clamore* against the person acquitted of all, and a second time *pro falso clamore* against the other two who are acquitted of part. It is sufficient to say, that the plaintiff sit in *misericordiâ quoad* all the defendants then on the face of the judgment it is well enough, *reddendo singula singulis*.

If defendant be acquitted of part, and judgment be entered *quod defendens sit quietus*, quoad that part whereof he is acquitted, this is error: because the judgment in the action is not final, as in a writ of right: nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action. But as the plaintiff's demand was groundless as to the part whereof the defendant was acquitted, the judgment as to that is, *quod defendens eat inde sine die*; for the plaintiff

Cro. El. 768,

plaintiff, as to that, has no farther cause to detain him longer in court. And if one of the defendants die after verdict, the plaintiff, as hereafter will be shewn, shall have judgment against the survivor, on suggesting the death: but then the judgment must be, that the survivors *apiantur*; and as to the person deceased, *quod querens nil apiat, &c.*

THE latter part of the judgment, *viz. quod querens nil apiat, &c.* has been held to be unnecessary; because, on suggesting the death, it is awarded by the court, that further proceedings shall itay against the person deceased."

WHERE there are several defendants, or plaintiffs, and one of them dies, how the judgment is to be taken and entered.

If there be several defendants, and one dies, after issue joined and before verdict, or after verdict and before judgment, the plaintiff may proceed against the survivors: but then he ought to suggest the death of that defendant in the *plea* roll; for it is not necessary to enter the suggestion on the *nisi prius* roll, unless to direct the Judge between whom he is to try the issue, and that he has jurisdiction to try it.

THIS was decided in the case of *Far v. Denn*, on a writ of error. *Denn* was plaintiff in the court below, and *Elizabeth Far* and *Rebecca Savil Far* were defendants. Issue had been joined between the plaintiff and both the defendants, and day was given to the parties, &c. "At which day (using the language of the record), comes as well the plaintiff as the said *Elizabeth Far*; but the other defendant, *Rebecca Savil Far*, doth not come;

"and the sheriff doth not return his writ." Then the death of *Rebecca Savil Far* was suggested on the roll, in the usual way, a new *venire* awarded to try the issue against the surviving defendant *Elizabeth Far*, and "that all further proceedings against *Rebecca Savil Far* shall cease." Then was set forth the record of the *posita* at the assizes, and the recovery against *Elizabeth Far*; and the judgment was, "that the plaintiff recover his term against the said *Elizabeth Far*." It was objected, that the *nisi prius* roll was erroneous in itself—that the *nisi prius* record varied materially from the plea roll—that the omission of "*quod querens nil capiat per breve*," as to *Rebecca Savil Far*, made the judgment erroneous—and that judgment ought not to have been for more than a moiety of the lands demanded. The death of *Rebecca Savil Far*, it was said, ought to have been suggested upon the *nisi prius* record; and it was not sufficient to mention it in the *jurata* part only. *Waldo v. Harrison* was cited where the *jurata* in the record of *nisi prius* was amended on the ground that the *jurata* part of the record is not an award of the court; but only to annex the proceedings. *Rebecca Savil Far* was in that part said to be dead; but that was only in a parenthesis, by way of recital, and not in the part proper for a suggestion of that description—which ought to be a full and positive assertion—inasmuch as proceedings are had upon it. That the record did not authorize the Judge to try the cause between one of the parties only. There ought therefore to have been a new *venire* awarded, or the former one ought to have been awarded against both defendants. And though

Barnes 3.

3. and 9. W. 3. the death must be suggested, yet a recital was not
c. 11. f. 7. suggestion; and which was not a discontinuance, but a mis-trial, not helped by the statute of Jeofails. That the *nisi prius* record varied materially from the plea roll

for it was not between the same parties.—LORD MANSFIELD thought there was no difficulty in the objections. The three first were no more than whether the Judge had jurisdiction to try the cause between the plaintiff and the living defendant only. Now the suggestion, award, and all the proceedings, shewed one of the defendants to be dead. There was an award for the proceedings to stay as to that defendant, and proceed against the other only; and the jury was awarded as against the living one, the other being dead. Both were alive when the issue was joined; and it was properly awarded upon the issue roll, and acknowledged. The *nisi prius* roll was only for the direction of the Judge, to try it: and it was not traversable on that roll. “The two last points are as plain. The judgment is right enough; and execution must be taken out according to the right and justice of what is really recovered.” Mr. Justice DENISON held it not necessary to enter and transcribe the very words of the suggestion from the plea roll upon the *nisi prius* roll, and all the continuances; but only enough to notify to the Judge what issues he was to try, and between whom. “It is as properly put in the *jurata*, as any where else; and it could not be traversed on the *nisi prius* roll: here is no variance, but only an omission of what was unnecessary to be put in. And there was no need of the “*querens nil capiat per breve*,” there is sufficient without it. As to the *last* exception, they might be joint-tenants; and then 'tis strictly right. But if not, the plaintiff recovers his term; and must take care not to take out execution for more than he had right to recover.”

If the plaintiff proceed to trial, and obtain judgment against all the defendants, without such suggestion, it

is error; because there can be no verdict or judgment against a person not in being. This is to be understood, where several defendants make a joint defence for the whole land demanded: for there they have a joint title; consequently the death of one can not abate the action, because the whole interest comes by survivorship to the others: then the plaintiff hath still persons before the court to defend for the whole, and may, on suggesting the death of one of the defendants, proceed against the rest. But where the declaration against the casual ejector is for several parcels, appertaining to several defendants, and each defends for his part only, there, on the death of one of them, the plaintiff cannot proceed against the survivors for ALL the land demanded in his declaration: for upon each defendant appearing for a part only, there are declarations delivered against each of them, *quoad* his part; which make them in the nature of distinct defendants: consequently, as to that part which was defended by the deceased, no person remains in court against whom judgment can be given, or execution awarded.

So where there are several plaintiffs, and one dies before verdict, or judgment, the survivors may proceed: because, where several declare on one lease, it is manifest on the face of the declaration, that they have a joint interest, which, on the death of one, must survive; the survivors therefore, having the whole interest, may proceed for the recovery thereof. We may add to this, that an ejectment being an action of trespass, if several commit a trespass, and one dies, there can be no reason why the rest should not be punished for the trespass; and therefore they may be proceeded against. So where an ouster, which is a trespass, is committed on the joint possession of several, and one dies, as the joint interest sur-

vives

vives, it is but reasonable that the survivors should have redress for the injury which was done to the possession; therefore surviving plaintiffs are allowed to proceed.

ONE of several joint defendants died after issue joined and BEFORE verdict, the plaintiff proceeded to trial against all, and afterwards suggested that one of the defendants died AFTER verdict, which the other defendants admitted to be true; on which the plaintiff had judgment against the survivors, who brought a writ of error;—the court thought it could not correct this after-judgment, because the judgment, as given, must stand, the court having no power over it, at least after the Term in which it was given. And in the exchequer-chamber they doubted if the error (if such there were) could be tried there; because the statute of *nisi prius* did not extend to that court, which was newly created. Cro. Car. 324.

BUT in a later case it is said, that if an ejectment be brought against two, and after issue joined, one of them dies, and a *venire* is awarded as to both the defendants, and a verdict given against them, yet, upon suggesting the death of one of them upon the roll, the plaintiff shall have judgment for the whole against the other. Ld. Raym. 717.

IN such case, it is certainly the better way to suggest the death on the roll *before* trial; and to award a *venire* to try the issue against the surviving defendant. 1. Burr. 362.

IF an ejectment be brought against baron and feme, and the plaintiff has a verdict against both, but before judgment the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; not only be- 1. Rol. Rep. 34. Cro. Jac. 356.

because it was a trespass committed by the wife, and therefore she is punishable for her own act, when injurious to another; but because, where the wife is found guilty of the ejectment, she must either have obtained that unlawful possession *jointly* with her husband, and then it survives, or else must have had the whole possession in her own right; in either case the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband.

1. Roll. Abr.
745.

WHERE there is but one plaintiff in ejectment, and after verdict on a trial AT BAR, but before judgment given, the plaintiff dies, yet the court may proceed to give judgment for him though he be dead; because the judgment and verdict, being both in one and the same Term relate to the first day of that Term, at which time the plaintiff was alive.

BUT if the trial had been at *nisi prius*, and the plaintiff had died after verdict and before the day *in banca*, no judgment could have been given; because the *passlea* comes in as of the Term subsequent to the death of the plaintiff and the judgment cannot, by any relation, precede the death of the plaintiff; consequently the judgment whether given for or against him, must be erroneous.

THIS however was at common law; for now, by the 17. Car. 2. c. 8. made perpetual by 1. Jac. 2. c. 17. s. 5. is enacted, that "in all actions personal, real, or mixt, the death of either party, between the verdict and the judgment, shall not hereafter be alledged for error; so that such judgment be entered within two Terms after such verdict." In the construction of this statute, it has been holden, that if judgment be *signed*, though it be not entered on the roll within two Terms after the verdict, it

Sid. 385.

sufficient: and that if either party die *after* the commencement of the assizes, though before trial, it is within the remedy of the statute, inasmuch as the assizes are in law but as one day.

BUT a *scire facias* must issue previous to execution, as in *Earl v. Brown*. The plaintiff died after verdict, and before judgment was entered: afterwards, judgment was entered and execution taken out, without any *scire facias* sued out at the suit of the representative. It was moved to set aside the *feri facias*, and it was held, that although the judgment was regularly entered by 17. Car. 2. c. 8. yet the *feri facias* issued irregularly, for there ought to have been a *scire facias*; so the *feri facias* was set aside, and the money levied ordered to be restored to the defendant.

IN cases of importance, the court, after argument, sometimes take time to deliberate previous to giving judgment; under such circumstances, and that the party may not be prejudiced, it will permit judgment to be entered, as of the Term in which the *postea* was returnable, *nunc pro tunc*. Thus, in *Tooker v. the Duke of Beaufort*, (where, while the question was depending before the court, who took time to advise after argument, the defendant died), it was moved for leave to enter up judgment, as of the next Term after the verdict, which was the Term in which it might have been entered up, if a motion had not obstructed it. 1. *Leon*. 187. *Ifley's Case*. It is discretionary in the court to grant this or not. 1. *Sid*. 462. *Crispe and Jackson v. Mayor of Berwick*, in point, 1. *Ventr*. 58. 90. S. C. LORD MANSFIELD. It seems reasonable; take a rule to shew cause. The rule was afterwards made absolute.

1. Burr. 146.

Ante, 269.

See 1. Burr.

226.

4. Burr. 2177.

2. Mod. 152.

3. Keb. 772.

Brownl. 128
to 133.

Salk. 160.

2. Mod. 152.

FORMERLY, though the death of the plaintiff abated the action, yet, because the lessor of the plaintiff was looked upon, by the court, to be the person concerned IN INTEREST, if there was any one of the same name with the plaintiff, the court would presume him to have been the person; and in such case not suffer the action to abate, because the lease was made to the plaintiff, only to try the title. Yet it is said, that if the *nominal* plaintiff release to one of the tenants in possession, who is made defendant, such release is a good bar; because the plaintiff cannot recover against his own release, since he is plaintiff on the record. But if such a release had been pleaded, the court would probably have solemnly decided against it; or, at least, have permitted the lessor of the plaintiff to change the name of the nominal plaintiff; for the release is a contempt. Now however such an objection cannot *probably* arise, inasmuch as the plaintiff on record is not only *nominal*, but generally *fictitious*; as *John Doe*, *John Goodright*, *John Goodtitle*, &c. and supposing such a circumstance to exist, yet, at this day, the defendant could not plead such a release; because he is tied down, by the rule, to rely on the general issue. If he were to offer such a release at the trial, it would not be admitted to defeat the action; the court, on the contrary, would exert every mean, within its power, to discountenance the practice of colluding with the *nominal* plaintiff.

INCIDENT to the judgment are the *COSTS*, or expences of the action, which are therefore, as next in order, to be treated of.

If the tenant do not appear, and judgment be consequently entered against the casual ejector, the plaintiff has no other remedy for his costs, than by an action for the

mesne

mesne profits; in which they are recoverable against the tenant, as consequential damages.

BUT if the tenant appear, and be made defendant, under the usual terms of confessing lease, &c. and afterwards, at the trial, refuses to make that confession, he is liable, upon the rule by which he was made defendant, to the payment of costs; which if not paid, an attachment lies against him: and this is all the remedy which the plaintiff has for his costs, if he be nonsuited, by the defendant not confessing lease, &c. If the tenant appear, confess lease, &c. and a verdict be given against him upon the trial, the judgment thereupon is entered against the tenant; on which judgment, the plaintiff may take out execution, as in ordinary cases: for this is not a case provided for by the rule.

Salk. 259.
Barnes, 4to
ed. 182.
Aule, 242.

By the words of the old rule it appears, that the original practice in the king's bench was, that upon not confessing lease, &c. the defendant paid no costs. And thus, the rule in the king's bench differed from that of the common pleas, which in such case required the defendant to pay the plaintiff his costs, to be taxed by the prothonotary, thereon: but, in the former court, the rule only excused the plaintiff from the costs of the *non pros*, in case the defendant did not, at the assizes, confess lease, &c.; therefore (in 13. Car. 2) on a motion that the defendant should pay costs, for not confessing lease, &c. it was denied. Afterwards, the rule in the king's bench came to be, that upon the defendant denying at the assizes to confess lease, &c. the rule for confessing it should be carried to the master, who should tax costs upon it; which costs should be demanded of the defendant, by some person having authority from the plaintiff's lessor, for so doing; then, if the same were not paid, the court, upon

1. Keb. 28.

Ibid. 501.

Salk. 259.
Lil. Pr. Reg.
503.

upon affidavit and motion, would grant an attachment against the defendant; for it was but reasonable, that when the plaintiff was at an expence to bring his cause to trial, the defendant, who deprived him of the benefit of that trial, should pay his costs: hence the practice in the king's bench was altered, in conformity with that of the common pleas, that the practice of both courts should be uniform on the subject, and the action not be confined to the controul of the latter court only.

a. Wils. 7.

IN *Thrustout v. Badwell* (in C. P.) the lessor of the plaintiff died BEFORE THE COMMISSION-DAY of the affizes, the cause was called on, and the plaintiff was nonsuited, because the defendant did not confess lease, &c. The court being afterwards moved, that the prothonotary might tax costs, upon the consent-rule, for the executor of the plaintiff's lessor, it was insisted for the defendant that the executor was not intitled to costs, the rule being merely personal; that if there had been a verdict for the defendant, he could not have had any costs; and that no attachment could be issued against an executor for non-payment of costs in such a case, nor could any action be sustained for them on either side: and of that opinion was the court. But in another case (*Goodright v. Holman*) where the plaintiff's lessor died AFTER TRIAL of the cause, it was ordered that the defendant should pay to the representative of the plaintiff's lessor, the costs which had been taxed on the consent-rule.

Barnes 4to
ed. 119.

Mich.

6. Geo. 2.

Tilly v. Bailly.

WHERE a verdict is given for the defendant, or the plaintiff be nonsuited, for any other cause than that of not confessing lease, &c. the defendant must tax his costs on the *postea*, as in other actions; and sue out a *capias ad satisfaciendum* for the same against the plaintiff, which he must shew, under seal, to the plaintiff's lessor.

and at the same time serve him with a copy of the consent-
rule; then if the lessor, being required, refuse to pay the
costs, the court, on motion, will grant an attachment
against him.

THE plaintiff in ejectment, though he be but nominal, *1. Lev. 66.*
yet if he be not found, or be not able to pay the costs, the *6. Mod. 309.*
attorney is liable, and may be committed until he pay
them, or produce a sufficient plaintiff.

So, if a stranger carry on a suit in another's name, who
has title, and yet is so poor that he cannot pay the costs;
in case he fail, the court, on affidavit of the circumstances,
will order the person who carried on the suit, to pay
costs to the defendant.

So, where baron and feme were lessors in ejectment, *1. Keb. 817*
and the baron died after entering into the rule; the *feme*
was notwithstanding held liable to the payment of costs;
because they were to be paid by the lessors of the plaintiff,
and both of them were in the lease.

If the plaintiff has a verdict in ejectment, and costs are *1. Sid. 279.*
taxed, and an attachment issues for non-payment of them,
the defendant shall not have an ejectment against the
plaintiff; IN THE SAME COURT, till he has paid those costs;
because as every superior court can enforce obedience to its
own rules, it will of course see that obedience be paid to them;
before they permit any one to proceed in a cause of the
same kind. Yet it was formerly ruled, that a man might
bring another ejectment, IN ANOTHER COURT, without
paying the costs of the former; and the reason assigned
was, that one court could not take cognizance of the rules
of another. The distinction however is now done away,
and the courts of Westminster-hall consider a former

Salk. 253.
Barnes 4to ed.
133.
Ante, 189.

ejectment in ANOTHER, in the same light as a former ejectment in the SAME court; and will stay proceedings in a new ejectment, till the costs of the former be paid, as well where the former ejectment was in ANOTHER, as where it was in the SAME court.

AND, after a long delay, the court has stayed the proceedings, and that, even the day before the trial; as in 2. Blac. 1158. *Chedwick v. Law*, in *C. P.* A former ejectment had been brought in the king's bench between the same parties where (in Hilary Term, 13. Geo. 3.) the defendant obtained a rule for costs for not proceeding to trial; which were taxed at 85l. 8d. after which the cause was tried in the same Term by a special jury, and verdict for the defendant; whose costs were taxed on the *posse*, on the 11th of June 1777, at 273l. 10s. Total 358l. 10s. 8d. no part of which was paid. It was moved in *C. P.* to stay the proceedings in this cause till the costs of the former were paid. For the plaintiff it was urged, that the application came too late. The declaration was delivered before the effoin day of Easter Term 1777. Notice of trial was given for the sittings after Trinity Term, viz. the 19th of June 1777. The plaintiff had been at the expense of preparing for trial, and bringing his witnesses to town, and the motion was not made till Friday the 13th of June. In support of the rule it was alledged, that the cause was so clear at the last trial, and the parties had rested so long that they did not think them in earnest till notice of trial was given. The defendant then proceeded to tax his costs, in order to ground this application, which otherwise he would not have done, the lessor of the plaintiff being insolvent. The court, on considering all the circumstances, made the rule absolute.

So, an ejectment brought by the *fraudulent* assignee of an insolvent, was stayed, till the costs of former ejectments, which had been brought by the debtor himself, were paid. Such was the case of *Chambers v. Law*; which appeared 2. Blac. 1181. to be a mere contrivance to defraud the defendant. The first ejectment was brought in the king's bench 1773, which failed. In July 1774, *Chadwick* took the benefit of an insolvent act, and delivered in his schedule. In Easter 1777, a new ejectment was brought in C. P. which was stayed till payment of the former costs. To evade that rule, and for no other purpose, a subsequent assignment was made to *Chambers*. "This (said the court) is too gross to be endured."—Rule made absolute to stay proceedings until, &c. and that *Chambers* should pay the costs of the application.

AND the court will stay the proceedings, even though the lessor of the plaintiff did not enter into a consent-rule in the former cause. As in *Ginger v. Barnardiston*, it was 2. Black. 904. moved to stay proceedings, till the costs of two former ejectments, brought on the same title, were paid. It was alleged; that in those, upon the tenant entering into the common rule, the lessor of the plaintiff had neglected to enter into the consent-rule, and no further proceedings were had; which was vexatious and oppressive to the tenant in possession, as there was no one from whom he could recover his costs. It was shewed for cause, that the costs were payable till the lessor of the plaintiff joined in the consent-rule. *PER TOTAM CUR.* We think this application very just and reasonable. It is said, that a lessor of the plaintiff is not answerable for costs by the tenant, or a new defendant entering into the common rule, till he himself joins in the consent-rule by signing it, and thereby making his option to proceed against the new defendant. This, whether reasonable or not, has

given rise to the present doubt; but we think, (and it is not our own opinion only, but that of other Judges,) that whatever foundation there may be for the practice alluded to, yet when the court sees manifest vexation and oppression, as in the present case, it will exercise its jurisdiction over this fictitious proceeding to prevent it—Rule absolute.

4. Mod. 379.
Roberts v.
Cook.

THOUGH the principle of this rule be founded in the supposed vexation of the party, yet where a DEFENDANT, against whom there had been a verdict in a former ejectment, afterwards brought an ejectment against the former plaintiff, for the same premises, the court would not stay the proceedings in the latter, till the costs of the former ejectment were paid. The courts would now perhaps interpose, and consistently with the principle, stay the proceedings; for though both actions be not commenced by the same person, yet in truth it is equally vexatious to proceed in the latter, till the costs of the former action be discharged. But no new ejectment can be brought by the defendant after a recovery against him, till he has quitted the possession, or the tenants have attorned to the plaintiff.

Salk. 258.
pl. 12.

Barnes 4to
ed. 180.

BUT where the lessor of the plaintiff was in custody under an attachment for non-payment of costs in a former ejectment, and brought a new ejectment upon the same demise, the court refused to stay the proceedings therein, till the costs of the former should be paid.

It is said that if the defendant had been in custody under an attachment for non-payment of costs in a former ejectment, and brought a new ejectment upon the same demise, the court would have refused to stay the proceedings therein, till the costs of the former should be paid. X. 7.

X. *The writ of error.*

IF the defendant do not, at the trial, confess lease, entry, and ouster, according to the rule, when he has accepted a declaration, he cannot have a writ of error; because, in such case, the judgment is against the casual ejector; the defendant therefore, not being party to the record of that judgment, cannot have a writ of error thereon. And if the defendant bring a writ of error in the name of the casual ejector, such ejector, being a friend to the plaintiff's lessor, may release the errors; or, on a motion for a *non pros*, the court will order it to be entered. So, if the landlord be permitted to defend, a writ of error cannot be issued in the name of the casual ejector. But on a writ of error from an inferior court, in name of the casual ejector, the court will not order a *non pros* to be entered, though his release of errors be shewn; because inferior courts are not competent to proceed, as before observed, by a rule for confessing lease, &c. So if an infant be tenant in possession, and the plaintiff obtains judgment against the casual ejector, for not confessing lease, &c. and the infant brings a writ of error in the casual ejector's name, and the defendant in error sets up a release from the casual ejector; the court will not suffer the release to be pleaded in bar of the writ of error; because no laches are imputable to the infant, for not confessing lease, &c.: in such case therefore the old practice is adopted, of suffering the defendant below to carry on the suit, in the casual ejector's name, to the end.

By the 16. & 17. Car. 2. c. 8. it is enacted, that "no execution shall be stayed by writ of error, upon any judgment, after verdict in *ejectione firmæ*, unless the plaintiff in such writ of error shall become bound, in

“ a reasonable sum, to pay the plaintiff in ejectment, all
 “ such costs, damages, and sums of money, as shall be
 “ awarded upon or after such judgment affirmed, discon-
 “ tinuance or nonsuit had.”

3. Burr. 1823. IN the case of *Whated v. Smart*, the defendant brought a writ of error in parliament, in an ejectment on the demise of one *Baughey*. The court compelled him to enter into a rule “ not to commit waste or destruction during “ the pendency of the writ of error.” *Mr. Smart* did not oppose it; and accordingly entered into the rule, and also justified to 400l.

4. Burr. 2501. AND in the case of *Thomas v. Goodtitle*, which was on a writ of error, from the court of common pleas, *Thomas*, the defendant below and plaintiff in error, offered to become bail to prosecute the writ of error, and to justify in double the rent. Judgment had been given for the plaintiff in ejectment, and also for 29l. costs. It was alledged, that the plaintiff had a mortgage upon the premises for as much as they were worth. The court, on consideration of the clause in the statute, and also of the practice, (which requires him to justify in double the rent,) did accordingly admit him to be bail (though objected to on the ground of insolvency); and the rent being 16l. per annum, he justified in double that sum. The court said, they had nothing to do with the mortgage.

7. Burr. 126. AND in the case of *Atkyns v. Horde*, judgment was given (in ejectment) in the court of king's bench, for the plaintiff, upon the right; but against him upon the remedy, which had been barred by the statute of Limitations. On this judgment a writ of error was brought by him in the house of lords; who determined on the latter point first and separately; and, holding the plaintiff

plaintiff to have been barred of his remedy, affirmed the judgment without ever entering into the question of right.

By another clause of the same statute, "in case of affirmation, discontinuance, or nonsuit, the courts are to issue a writ, to inquire as well of the mesne profits, as of the damages by any waste committed, after the first judgment; and are thereupon to give judgment, and award execution, for the same, and also for costs of suit."

THE act does not extend to any writ of error brought by an executor or administrator. And the plaintiff in ejectment may bring an action of trespass for the mesne profits, pending a writ of error; for it may be that the writ of error was only brought for delay; but supposing it to be otherwise, and that the plaintiff should recover for the mesne profits, such recovery may be given in evidence to the jury, on a writ of enquiry, to lessen the damages.

So plaintiff may enter, pending the writ of error, upon a judgment in ejectment, if he find the possession vacant; for the writ of error binds the court, not the right of the party: but he must not enter with force.

AN administrator brought a writ of error, upon a judgment in ejectment against his intestate; and though the judgment was affirmed, and the writ of error brought in delay of execution, yet it was holden that the administrator should not pay costs: for he is not bound by the judgment, but only the assets of the deceased. Besides, as the administrator acts in *auter droit*, he is not presumed to bring the writ of error merely for delay.

XI. *Of the execution.*

1. Burr. 90.
Ante, 399.

AS the plaintiff in this action recovers only possession of the PROPERTY in question, execution of course is of the possession only.

Id. 88.

1. Rep. 196.
10. Rep. 38.
Bro. Tit.

Cap. 3.

Hut. 66.
2. Sid. 156.

Barnes, 4to
edit. 182

WHEN the judgment was extended to a recovery of the term itself, (the judgment originally being only for damages,) it of consequence gave rise to the *habere facias possessionem*. In real actions, where the freehold was recovered, the demandant had execution by the writ of *habere facias seisinam*: in ejectment therefore, it was but just that a similar remedy should be afforded to the plaintiff; who as he now had judgment to recover the possession, might put the sentence of the law in execution, by virtue of the *habere facias possessionem*. But though this remedy to obtain possession was given to the plaintiff, yet no rule of law is more uncontroverted than that a recoveror may enter, without a writ of execution, where the demand is certain. As the demandant after judgment in a common recovery may enter, or take out execution at his election, so the conusee may execute a fine executory, (which does not take effect till execution,) by entry. The plaintiff may have a re-disseisin on the statute of *Merton*, (which gives it after recovery in an assize of *novel disseisin* and delivery of seisin by the sheriff,) as well where he executes the recovery by entry, as where the sheriff delivers seisin to him. So the patron who recovers in *quare impedit* may present, without a writ, to the bishop. *Rudd Bishop of Lincoln*. And the lessor of the plaintiff may enter, after recovery in ejectment.

WHERE the landlord is admitted to defend instead of the tenant, and judgment is entered against the case, ejectment

jector, with stay of execution till further order, if the landlord be afterwards nonsuited for not confessing lease, &c. or if a verdict be given against him upon the trial, the plaintiff must move the court for leave to take out execution against the casual ejector; and the day of shewing cause against the motion, is the proper time for the landlord to resist the plaintiff taking out execution, and obtaining the possession.

As, in the case of *Bradley v. Wisdom*, a rule had been 2. Burr. 756. obtained to shew cause why a writ of *habere facias possessionem* should not be set aside, and why possession of the premises should not be restored. This was an ejectment, in which *Wisdom* (the landlord) had (upon the tenant refusing to appear) made himself defendant, in place of the casual ejector (against whom judgment was signed for want of appearance); and the plaintiff, having obtained judgment against *Wisdom* the landlord, afterwards moved for leave to take out execution against the casual ejector: from doing which without leave he was restrained by the conditional rule, which always stays execution against the casual ejector till further order. But though a writ of error had in fact been regularly sued out by the new defendant *Wisdom*, before the plaintiff had made this motion (which for leave to take out execution against the casual ejector, and that circumstance was *not* shewn for cause by the landlord, against the motion for leave to take out execution against the casual ejector; which rule was made absolute, without any cause being shewn against it. The court was of opinion, that the day of shewing cause against that rule was the proper time for the landlord to have made his stand against the plaintiff taking out execution and getting into possession; that he should have then shewn his writ of error as cause why the plaintiff ought not to have had leave to take out execution; and why it ought

See 11. G. 2:
c. 19.

ought to have been further stayed: and that as he had omitted to do so, when he had the proper opportunity, the execution was regular, and consequently ought not to be set aside: as, in *Edwards v. Edwards*, it was shewn for cause, and allowed.—Rule discharged.—
N. B. It was admitted, that a writ of error could not have been taken out in the name of the casual ejector.

On the writ of execution is to be considered,

1. WHEN the writ is to be sued;

2. How it is to be executed;

3. How the plaintiff is to be quieted, and what relief he has, when his possession is disturbed after execution executed.

1. In C. 469,
 but see
 2. Salk. 602.

At the common law, if the plaintiff, after having obtained judgment in a PERSONAL action, had lain quiet without taking out any process of execution within the year, he was put to a new original upon his judgment as in an action of debt, writ of annuity, or other personal action, wherein debt or damages were recovered: but in REAL actions, where land was recovered, the demandant after the year, might sue out a *scire facias* to revive the judgment. The reason of the difference seems to be because the judgment being PARTICULAR, in the REAL action, *quoad* the lands, with a certain description, the law required that the execution of such judgment should be entered on the roll, that it might be seen whether execution was delivered of the *same thing* of which judgment was given: if therefore no execution appeared on the roll a *scire facias* issued, to shew cause why execution should not issue. But where the action was PERSONAL, no *scire*

facias

scire facias was issuable by law on the judgment, because in each action there was no judgment for any particular thing, with which the execution could be compared; therefore after a reasonable time, (a year and a day,) it was presumed to have been executed: for which reason the law allowed not to the party, after that time, a *scire facias*, to shew cause why there should not be execution; but left him to his action on the judgment, and the defendant was obliged to shew, how that debt, of which the judgment was evidence, had been discharged.

To remedy this, and to render the forms of proceeding more uniform in both actions, the statute of *Westminster 2.* 12. 45. gave the *scire facias* to the plaintiff, to revive the judgment, where he had omitted to sue execution within a year after judgment was obtained. "*Quod ea quæ inveniuntur*" (says the statute) "*irrotulata coram his qui recordum habent, sive servitia aut consuetudines, recognitiones, vel alia quæcunque irrotulata, si recens sit cognitio, viz. infra annum, statim habeant brevè de executione illius recognitionis; et si forte à majore tempore transacto facta fuerit illa recognitio, præcipiatur vicecomiti quod scire faciat, &c.*" 2. Inst. 469. It has been doubted, on these words, whether a *scire facias* may be used to revive a judgment in ejectment for the land; not only because the term or possession was not, at the making of the act, recoverable in the action, and therefore the act could not be supposed to provide for it; but because the words of the act seem to confine the *scire facias* to those judgments, where only debt or damages were recovered. On these reasons I take the resolution in *Siderfin* to be founded; because though on a judgment in ejectment a *scire facias* may issue after the year, for the damages, says the Book, it is not absolutely necessary that there should be a *scire facias* as to the land. The practice however seems to have prevailed otherwise; and there seems

1. Salk. 558.
600.
3. Salk. 319.
Ld. Raym.
to 806.

Comb. 259.

1, Inst. 378.

Gillb. Law of
Es. 97, 3.Leges Hom-
bari, lib. 2.
tit. 43.

Co. Lit. 254.b.

to be some reason for the practice. The words are "*sive servitia, sive consuetudines, sive alia quacunq; irrita*" "*blata;*" which should comprehend all judgments, and give the like remedy on them by *scire facias*, as the defendant had on a judgment in a real action at common law; if therefore the plaintiff in ejectment, after the year take out execution without the *scire facias*, the court will award a writ of restitution, *quia erroneè mandavit* for which the plaintiff remains so long quiescent after judgment, it is presumed that he has released the execution; the defendant therefore is not to be disturbed in his possession, without being previously called upon by *scire facias*, and by that mean having an opportunity in court, either of pleading a release, or shewing cause, he can, why execution should not issue. Besides, after the year and day are elapsed, the plaintiff and defendant are both out of court; for the warrant of attorney is only *quousque placitum terminetur*, and the defendant's *placitum* is determined by the judgment; but as to the plaintiff he remains in court for a year and a day afterwards either to receive and acknowledge satisfaction, or to take out process in order to obtain it. The year and a day was the ancient term for the tenant to demand investiture and do fealty, in the lord's court; which if not done within that time, the feud was lost. Indeed that seems to have been the general limitation, after which laches are efficiently attached. Accordingly we find that, at the common law, upon a fine, or final judgment in a writ of right, the party grieved could only claim within a year and a day; the same time was allowed for continual claim and (in common with other purposes) for judicial acts remain in force; therefore, after that time, all proceedings were said to be asleep, till a new day in court was given to the parties, by *scire facias*.

THOU

Though there be only a year and a day to execute the judgment, yet if execution be taken out within and continued beyond the year, there is no necessity for a *scire facias*. No presumption can then attach, that the plaintiff has released the execution; because, having been duly taken out, it may be owing to the neglect of the sheriff that it was not executed. 1. Inst. 471. 2. Leon. 77.8.

BUT if the plaintiff die within the year and a day, his executors cannot take out execution without a *scire facias*; for they are not parties to the judgment; though if execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the court, and not from the party. The writ of possession has relation to its *teste*; therefore, though it be not actually sued out till after the death of the lessor of the plaintiff, yet if it be *tested* before his death, it is regular. As in *Beger v. Roe*, on shewing cause against a motion to set aside a writ of possession for irregularity (for that the lessor of the plaintiff died before the writ was actually sued out); the facts were, that he died on the 1st of March, after which the writ was taken out. It was *tested* on the last day of the preceding *Hilary*, returnable on the first day of the following *Easter Term*. The master certified that the proceeding was regular, and said it would have been so in any other case, as well as in an ejectment, the writ having relation to its *teste*. The court were clear that the proceeding was regular. It is an ejectment brought by *John Doe*, and the defendant does not shew that *John Doe* the plaintiff in the action, is dead. However the legal relation to the day of the *teste* is proper to be supported, in maintenance of the writ of possession on a judgment in ejectment. The rule was discharged with costs.

6. Mod. 288. If the plaintiff has judgment, with stay of execution for a year, he may, after the year, take out execution without a *scire facias*; because the delay is by consent of parties, and in favour of the defendant: and the indulgence of the plaintiff should not operate to his prejudice, nor should the defendant be allowed to take any advantage of it, when it appears to have been done for his advantage, and at his instance. But this delay of execution (being only the compromise or agreement of the parties) is never entered on the roll; therefore, after the year, the plaintiff should regularly perhaps move the court for a *scire facias*, lest the execution should be defeated, *quia erroneè emanavit*.

1. Keb. 785.
6. Mod. 288.

5. Co. 88.
Cro. El. 416.
6. Mod. 288.
2. Inst. 471.

So, if the defendant bring a writ of error, and thereby prevent the plaintiff from taking out execution within the year, and the plaintiff in error is nonsuited, or the judgment affirmed, the defendant in error may proceed to execution after the year, without a *scire facias*; because the writ of error was a *superseas* to the execution, and the plaintiff must acquiesce till he hears the judgment above. Besides, while the cause is depending on the writ of error, it is still *sub judice*, whether the plaintiff shall recover the land or not; and the year for execution ought to be accounted from the final judgment given.

2. Rd. Rep.
294.

INDEED in one case it is laid down, that if a writ of error be brought AFTER the year is elapsed, and thereupon the former judgment be affirmed, such affirmation will revive the former judgment, and enable the party to take out execution without a *scire facias*. But from this case it seems, that if the plaintiff in error be nonsuited to the writ of error be discontinued, there can be no execution of the former judgment without a *scire facias*. So if the plaintiff be restrained by injunction out of chat-

6. Mod. 288.
Balk. 322.
Ser. 301.

tery, for a year, he cannot take out execution after the year without a *scire facias*; because the courts of law do not take notice of injunctions, as they do of writs of error: besides, it might be no breach of the injunction, to take out execution within the year, and continue it down by *vicecomes non misit breve*, which, it seems, cannot be done in the case of a writ of error; because that removes the record out of the court where judgment was given: and therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.

To a *scire facias*, to have execution for land and damages, the defendant pleads an entry into the land after judgment, and before the *scire facias* issued; this was held an ill plea, because the defendant did not answer to the damages as well as to the land, which were both comprised in the *scire facias*; the plaintiff therefore had judgment to take the writ of execution for both land and damages: because if the whole be not denied, there must be execution according to the judgment remaining on record. And in this it differs from a debt *in part*, where if a man plead to part only, the plaintiff must take judgment to the residue, otherwise it will work a discontinuance.

In *Sedgwick v. Goston*, tenant for years had judgment in *skin. 14.* judgment, and, after the term had incurred, brought a *scire facias quare executionem habere non debet* of the land, and his damages and costs; the defendant demurred. It was held by the court, that though the plaintiff might have had a *scire facias* for his damages and costs, yet this was not good for the term likewise, which was incurred, was there ill; and a new *scire facias* ought to issue. It was afterwards argued by HOLT, that the *scire facias* was good for the damages; but the court were of a different opinion, and accordingly another *scire facias* was issued.

2. How

2. How the writ is to be executed:

1. Burr. 366.

An execution should be issued, according to the right and justice of what has been really recovered, the plaintiff must be careful not to take out execution for more than he had right to recover. And that the sheriff may not labour under any difficulty in executing the writ of possession, the practice now is, (different, indeed, from what it formerly was) for the plaintiff himself not only to point out to the sheriff, *that* which, in execution of the writ

Id. 629.

5. Burr. 2673.

he is to deliver him possession of; but to take possession at his peril, of only *that* which he has title to: for should he take possession of more than he has recovered and proved title to, the court will, in a summary way, interpose and set it right. As in *Saul v. Dawson*, the plaintiff as tenant in common, recovered possession of five eighths of a cottage. A writ of possession was executed by the sheriff, who turned the tenant out of possession of the whole, and locked up the door. — CURIA. This was wrong; the writ ought to have pursued the verdict. Let there be a rule upon the sheriff, and the lessor of the plaintiff, to restore the tenant to the possession of the eight parts of the premises, otherwise he must of necessity bring another ejectment for them.

6. Co. 91. b.

THE words of the writ are, "*quod habere facias possessionem*;" so that not only actual, but full possession must be given by the sheriff: consequently all power necessary to that end must be afforded him. If therefore the recovery be of a house, the sheriff may justify breaking open the door, provided he be denied entrance by the tenant; for otherwise, the writ could not be executed.

2. Roll. Abr. 380.

If the plaintiff recover several messuages, in the possession of different persons, the sheriff must go to each

house, and deliver possession thereof; which is done by turning the tenants out. For the delivery of the possession of one messuage in the name of all, is not a good execution of the writ, because the possession of one tenant is not the possession of the other, each having a several possession.

BUT it seems by ROLLE, that if all the messuages had been in possession of one tenant, it had been sufficient to give possession of one in the name of all; but, without

1. Rol. Abr.

886.

2. Rol. Rep.

411.

Without doubt, the surest way is for the sheriff to remove all the tenants entirely out of each house, and when possession is committed, to deliver it to the plaintiff. For if the sheriff dismiss all the persons he find in the house, and give the plaintiff, as he thinks, quiet possession; and after the sheriff is gone, some person remains lurking in the house, it should seem, is no good execution; and therefore the plaintiff might have a new *habere facias*, because he never had full execution. I have no doubt but the courts should now hold it to be a full execution of the writ.

1. Leon. 145.

WHERE the recovery was of land, and more was demanded than recovered, as suppose the demand for five hundred acres, and verdict and judgment only for an hundred acres, it seemed doubtful, formerly, how the sheriff was to give execution. ROLLE says, it is sufficient

1. Rol. Abr.

886.

to give the plaintiff possession of two or three acres, in the name of the whole. That, indeed, was the safest conduct for the sheriff, when he executed the writ at his own peril; for, if he gave possession of any land not recovered, he was not in the *habere facias possessionem*, he was a trespasser, and liable to an action of trespass. But because the *habere facias* is to give the plaintiff the benefit of his judgment, which cannot be done without actual possession being made of the whole, it hath been held, that the sheriff

Palm. 289. doth not discharge his duty by giving one acre in the name of the whole; but ought in such case to set forth all the acres in particular: otherwise, it would leave the execution uncertain, consequently not afford to the plaintiff the full benefit of his judgment. At this day however, the practice is, for the plaintiff to give the sheriff security to indemnify him from the defendant, and then for the sheriff to give execution of what the plaintiff demands: but if the plaintiff take more than he has recovered, and shewn title to, the court will set it right, in a summary way.

Ante, 432.

1. Rol. Rep.
420.
1. Rol. Abr.
886.

If the execution be for twenty acres, the sheriff must give possession of twenty acres, according to the estimation of the county in which the lands lie.

3. How the plaintiff is to be quieted, and what relief he has, when his possession is disturbed after execution executed.

2. Keb. 245.
Palm. 289.
1. Rol. Rep.
353.
6 Mod. 27.
2. Brownl.
253.

*1 Tarrant. Neph
54 contra*

THE return of the writ of execution is so much in the power of the plaintiff, that the court will not, at the instance of the defendant, direct it to be returned: in truth it is left to the discretion of the plaintiff, that he may do what is most for his own advantage, in order to have the full benefit of his judgment; the best way to effect which is to permit him to renew the execution at his pleasure, until full execution be obtained. For the plaintiff cannot renew execution, after one *habere facias* is returned and filed; because then it appears on record, that he hath had the benefit of his suit, and a new execution would consequently be superfluous: hence the court will not oblige the sheriff to make any return, unless at the expense of the plaintiff himself.

If the writ be returned by the sheriff, though not filed, ^{2. Brownl. 216.} it seems no new *habere facias* can issue; because when the return is made, it becomes a record, which the court is entitled to.

BUT if the writ be neither returned nor filed, there is Palm. 289. then no act of record by which it can appear to the court that the plaintiff hath had any benefit from his judgment; therefore on a suggestion *ulcecomes non misit breve*, the plaintiff is entitled to a new writ, because the omission of the officer shall not operate to his prejudice. But the new writ cannot issue, until the return of the first be expired; because, unless the return be past, *non constat* but the sheriff may do his duty, and the plaintiff have the full benefit of his judgment: in which case there would be no necessity for a new *habere facias*.

If the officer be disturbed in executing the writ, on an ^{6. Mod. 27.} affidavit of the facts, the court will grant an attachment against the party, whether he be the defendant or a stranger. The writ being the process of the court, any disturbance to the execution of it, is a contempt to the authority of the court from whence it issued; and as such, will be punished. The process, it should be observed, is not understood to be executed, nor the execution complete, until the sheriff and his officers are gone, and the plaintiff left in full and quiet possession.

BUT after possession given, either on the *habere facias*, ^{1. Keb. 779. 725.} or by agreement of the parties, the law seems to make a difference, where the plaintiff is turned out of possession by the defendant, and where by a stranger. When by the defendant himself, the plaintiff may either have a new *habere facias*, or an attachment; because the defendant himself shall never, BY HIS OWN ACT, keep the possession

F f 2

which

which the plaintiff has recovered from him by the COURSE OF LAW. But where a stranger turns the plaintiff out of possession, after execution fully executed, the plaintiff is put to another action, or to an indictment, for the forcible entry. The reason is, that the title was never tried between the plaintiff and the stranger, who may claim the land by a title paramount the plaintiff; or may come in under him: then the recovery and execution, in the former action, ought not to hinder the stranger from keeping that possession which he may have a right to. Were the law otherwise, the plaintiff might, by virtue of a new *habere facias*, turn out even his own tenants, who come in after the execution executed; whereas possession was awarded to him only against the defendant in the action, not against others, who were not parties to the suit.

Sty. 318.

Thus, in the case of *Fortune v. Johnson*, the court was moved for an attachment against *Johnson*, for ejecting one who had been put in possession by an *habere facias*; but because it appeared that *Johnson* claimed under a prior judgment, the court would not make any rule in it, because it was title against title, and therefore left them to their course at law.

2. Black. 392.

BUT in the case of a tenant (who cannot be considered as a mere stranger), it is otherwise. As in *Povey v. Dugan*, an attachment was granted, and that absolute, in the first instance, against the tenant in possession, on an affidavit that he had been served with a rule of court (which had been made absolute), for delivering up the possession, and had refused so to do.

Sty. 408.

THE plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for

the residue of his term, and held it accordingly for some time, when the plaintiff issued an *habere facias*, and executed it. The defendant moved the court for restitution, on the ground of the agreement; which the court would not grant, but left him to his action on the case, for breach of the agreement, because the judgment was entered absolutely.

WITH deference, that decision is not intitled to much, if to any attention. For in the case stated, nothing can be more evident than that the execution was issued contrary to *good faith*; which, whenever that appears, the court, in the conscientious exercise of its summary jurisdiction, will interpose, and correct it.

But if the judgment had been entered with a *cesset executio*, for a given time, and the plaintiff had taken out execution within it, the defendant might have had restitution; because, as to the judgment, the plaintiff was not to have the fruit of it, until the time limited was expired. But how could that appear to the court? since the *cesset executio* is not entered on the roll. The difference seems to have been between a judgment by confession, and judgment on verdict. Where the former was given with a *cesset executio*, if execution was afterwards taken out, contrary to agreement, the court would set it aside, and punish the attorney; but where judgment was given on a verdict, there the verdict being the ground of the judgment, the court would not take any notice of the subsequent agreement of the parties, but left them to their remedy, as before observed, according to the present practice, if the truth be manifested to the court by affidavit, the party may obtain relief from its summary jurisdiction.

and not otherwise. It is a legal remedy, and is a legal remedy.

XII. *Of the action for the mesne profits.*

IT has already been observed, that an ejectment is not a proper action for the mesne profits. The reason is obvious. An ejectment, at this day, is a feigned action brought against a nominal defendant, and generally on a supposed ouster: but an action for the mesne profits is wholly dependant on facts,—being brought against the real tenant, for profits which he has actually received. In the one case therefore the damages are merely nominal: in the other, they are such as the plaintiff has sustained by a real injury; and the fiction in the former does not, in any manner, affect the latter. In short, it has only two objects of enquiry; namely, length of time, and value of the premises: and though it be in form an action of trespass, yet, in effect, it is to recover the rent, or profits.

1. T. Rep. 16, 17.

Id. 347.

THE action for mesne profits certainly results from, or is rather consequent to, the recovery in ejectment. It is an action of trespass *vi et armis*, brought by the lessor of the plaintiff, in his own name, or in the name of the nominal lessee (for it may be brought in the name of either against the tenant in possession, to recover the value of profits unjustly received by the latter, in consequence of the ouster complained of in the ejectment. It is usually brought by the lessor of the plaintiff in his own name and in that case, on proving a good title in himself, and an actual ouster and perception of profits by the defendant, antecedent to the demise and ouster in ejectment, he will recover damages for those profits. They are seldom however an object of litigation, as the demise and ouster in ejectment are generally laid soon after the time when the lessor's title accrued.

Decosta v. Atkinson, Hil. 4. Geo. 2,

If the action be brought in the name of the *nominal* lessee, the court, on application, will stay the suit till security be given for answering the costs; but will not permit such a plaintiff to release the action: his release therefore, has been set aside, as a contempt of court. Skin. 247. Salk. 260.

It was formerly doubted, whether an action for the *mesne profits* could be brought, in the name of the lessee or nominal plaintiff in ejectment, after judgment by default against the casual ejector; but it is now settled, that there is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant; in the latter, it is confessed. Ante, 163.

THERE certainly are some cases in which the jury are not bound by the amount of the rent, but may give *extra* damages: and after judgment by default, the costs in ejectment are recoverable, and are therefore usually declared for as damages, in the action for *mesne profits*. 1. T. Rep. 547. and see 1. Will. 221. 2. Poph. 444, 445.

BUT in one case, where they were not included in the verdict, the court refused to assist the plaintiff. That was the case of *Gulliver v. Drinkwater*. The defendant suffered judgment by default. On executing the writ of enquiry, the jury gave a verdict for the rent of the premises, but did not include the costs of the ejectment. The defendant became bankrupt after judgment in ejectment, and before the action for *mesne profits* was brought. A rule was obtained, to shew cause why the inquisition should not be set aside, because the jury had not given the costs of the ejectment in damages.—ASHMURST, J. This is an application to the discretion of the court to set aside the inquisition, because the damages given by the jury were too small. No doubt the plaintiff had

had another remedy for the costs; for being a liquidated debt, he might have proved it under the commission. As he has neglected to do that, and chosen to take the chance of recovering, in an oblique, more than he could have recovered in a direct manner, and has failed, I am not disposed to assist him. Though in many instances of actions of trespass for *mesne profits*, the jury take into consideration the costs incurred in recovering the possession by ejectment, yet it does not appear to me, under all the circumstances of *this* case, that they were bound to do so here: for the statutes relative to bankrupts were made for the benefit of unfortunate persons, who, in giving up their whole substance for a fair and equal distribution among their creditors, are entitled to be discharged of all debts due previous to their bankruptcy.—Rule discharged.

Lit. Pr. Reg.

§ 960.

§ 960.

As to the proof required in this action, it was formerly holden, that if the action were brought by the lessor of the plaintiff in any case, or by the lessee or nominal plaintiff after judgment by default against the casual ejector, the defendant in such action might controvert the plaintiff's title, or right to the possession, during the time when the *mesne profits* arose: for though it was admitted, that where the tenant had appeared, and confessed lease, entry, and ouster, he was estopped by that confession from afterwards disputing the plaintiff's title, in an action for the *mesne profits* brought by the lessee or nominal plaintiff; yet it was holden, that the benefit of such estoppel could not be extended to the lessor of the plaintiff, inasmuch as he was no party to the record in ejectment: and upon a similar principle it was holden, in the other case, that the tenant, who had never appeared, could not be estopped by the judgment against the casual ejector. But it is now settled upon principles, that after a recovery in ejectment, the tenant is estopped from con-

troverting

reverting the plaintiff's title, in a subsequent action for the *mesne profits*; provided the plaintiff only proceeds for *mesne profits* from the time of the ouster complained of in ejectment: but if he proceed for *antecedent profits*, he must prove his title to the premises from whence they arose, to shew his right to receive them.

THE principles here laid down respecting the action for *mesne profits*, were recognized and established in the case of *Astin v. Parkin*. LORD MANSFIELD, in delivering 1. Burr. 667. the opinion of the court in that case said, "all the Judges are of opinion, that the nominal plaintiff and the casual ejector are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented under the controul and power of the court, for the advancement of justice in many respects; to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side. That the lessor of the plaintiff, and the tenant in possession, are substantially, and in truth, the parties and the only parties to the suit. The tenant in possession must be duly served; if he be not, he has a right to set aside the judgment. If, after he is duly served, he does not appear, but lets judgment go by default, such judgment is carried into execution against him by a writ of possession. That there is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant: in the last case, it is confessed. An action for the *mesne profits* is consequential to the recovery in ejectment. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee: and in either shape, it is equally his action. The tenant is

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concluded by the judgment, and cannot controvert the title. Consequently he cannot controvert the plaintiff's possession, because his possession is part of his title for the plaintiff, to entitle himself to recover in ejectment, must shew a possessory right not barred by the statute of Limitations. This judgment, like all others only concludes the parties as to the subject matter of it; therefore, beyond the time laid in the demise, it proves nothing at all: because, beyond that time, the plaintiff has alledged no title, nor could be put to prove any. As to the length of time the tenant has occupied the judgment proves nothing; nor as to the value therefore it must be proved, how long the defendant enjoyed the premises, and what the value was. The unanimous resolution of all the Judges, upon the plain principles, will not only be a certain and uniform rule upon actions for *mesne profits*, but may tend to the fictitious remedy by ejectment upon a true and liberal foundation, to attain speedily and effectually the complete ends of justice, according to the real merits of the case."

HENCE it should seem, that in order to prove the plaintiff's title in an action for the *mesne profits*, it is only necessary to produce the judgment in ejectment; and in the practice, where the judgment is after verdict: but in judgment by default, the practice is different; then usual not only to produce the judgment, but also to produce a writ of possession executed. This latter proof does seem to be necessary; for if the tenant be concluded by the judgment in ejectment, from controverting the plaintiff's title, he is consequently concluded from controverting his possession, because possession is part of his title.

R. N. P. 87.

In the case of *Goodtitle v. Toms*, it became a question, whether one tenant in common, who had recovered in an action of ejectment by default, could maintain an action against the other, to recover damages for the exclusion and *mesne profits*. It was objected, that although a tenant in common might maintain an ejectment against his companion, upon an actual ouster, yet he could not have an action of trespass against him to recover damages and the *mesne profits*; and in support of the objection, was cited *Lit. sect. 322.* and *Coke's* comment upon it. — *Ante*, 191.

WILMOT, Ch. J. Before the time of Hen. 7, plaintiffs in ejectment did not recover the term; but until about that time, the *mesne profits* were the measure of damages. To brush out of my mind all fiction in an ejectment, the real plaintiff and nominal defendant, the casual ejector, are *dramatis personæ*, or *actores fabulæ*, and consider the recovery by default, or after verdict, as the same thing; viz. recovery by the lessor of the plaintiff, of his term, against the tenant, in the actual wrongful possession of the land. In the old law and practice in ejectment (as I before said), the plaintiff recovered nothing but damages, the measure whereof was the *mesne profits*; no term was recovered; but when it became established that the term should be recovered, the ejectment was shaped into the form of a real action; the proceeding was *in rem*, and the thing itself, the term, was recovered and nominal damages; but not the *mesne profits*; whereupon this other mode of recovering the *mesne profits* in an action of trespass was introduced, grafted upon the fiction of ejectment. I take it, that the present action is put in the place of the ejectment in common law, which was indeed a true and not a fictitious action, and in which the *mesne profits* only, and not the term, were recovered, for it was no other than a mere action of trespass. You have turned me out of possession, and kept me out ever since the demise laid in the declaration,

ration, therefore I desire to be paid the damages to the value of the *mesne profits* which I lost thereby; this is just and reasonable.—Gould, J. It must be taken for granted in this case, that there was an actual ouster, and that the defendant kept him out from the time of the demise to the judgment in ejectment. The plaintiff in this case is not confined to the very *mesne profits* only; but may recover for his trouble, &c. I have known four times the value of the *mesne profits* given by a jury in the sort of action. Were it not so sometimes, complete justice could not be done to the party injured. The action may be brought either in the name of the nominal plaintiff in the ejectment, or by his lessor. It follows the ejectment as a necessary consequence. The judgment in ejectment by default is of the same effect in this case, if it had been after verdict; and the court will interfere in every thing possible against the defendant; that there was an actual ouster, if that were necessary in this case; but I think, proof of the judgment in ejectment and the writ of possession executed, was sufficient in this case to warrant a verdict for the *mesne profits*.

2. Blac. 1077. So, in *Cutting v. Derby*, the court determined, that where one intire injury is done to both tenants in common they shall have one intire remedy. But where the injury is *separate*, they may have several actions: one tenant in common may bring an ejectment for his moiety, and make himself tenant in common with the lessee of the other.

3. Willf. 121. As to the value of the *mesne profits*, the judgment in ejectment does not prove any thing; the value thereof must necessarily be proved: but in estimating it, the jury are not confined to the mere rent of the premises; they may give whatever damages they think proper: though

the defendant may plead the statute of Limitations, and by that mean protect himself from all but the last six years. Bankruptcy however is no plea in bar to the action; which was decided in *Goodtitle v. North* and others. That Dougl. 586. is an action of trespass for *mesne profits* against several defendants: plea by two of them (husband and wife), that the husband became bankrupt after the cause of action accrued: general demurrer. In support of the demurrer, it was contended, that the statute 5. Geo. 2. c. 30. which makes this plea, only speaks of debts due before the bankruptcy, and that an injury by entering the plaintiff's close, cannot constitute a debt. That a party could not in any case of tort, liquidate his own demand for damages, and carry it to it before the commissioners: it could only be ascertained by the intervention of a jury: the rent was not a sure criterion. That more than five years rent had been given by verdict, for only one year's possession. No doubt therefore could have been proved for such a cause of action under the commission, therefore the bankruptcy was no bar. For the defendants, it was admitted that bankruptcy was no bar to demands for *torts* in general. Here, though the form of the action was trespass, yet the demand, in substance, was for a debt, *viz.* the annual value of the land, and might have been the subject of an action for use and occupation, in bar to which the bankruptcy might be pleaded. In reply, it seemed agreed, that in an action for use and occupation, bankruptcy might be pleaded; and that it had been decided, that a party who goes for *mesne profits* after judgment in ejectment, cannot waive the trespass, and bring an action on the case for use and occupation. But it was insisted, that when a party does not waive it, the amount of his demand, or what he might think him entitled to, was uncertain; many circumstances might increase the amount of the damages, as particular circumstances of inconvenience to the plaintiff from having

But see
3. T. Rep. 539.
2. T. Rep. 261.
Doug. oct. 1.
v. 167.

having been kept out of possession, &c.—**LORD MANSFIELD.** The form of the action is decisive. The plaintiff goes for the whole damages occasioned by the tort, and when damages are uncertain, they cannot be proved under a commission of bankruptcy.—**ASHHURST, J.** The plaintiff goes for a compensation in damages, the amount of which is uncertain, and cannot be sworn to before the commissioners, but must be ascertained by a jury upon all the circumstances.—**BULLER, J.** The damages here are as uncertain as in an action of assault.—**Judgment for the plaintiff.**

OF THE WRIT *quare ejecit infra terminum.*

F. N. B. 197. S. THE writ *quare ejecit infra terminum* lieth, when a man leaseth lands to another for years, and after he tereth and maketh a feoffment in fee, or for life, of the same lands to a stranger; in which case the lessee have this writ against the feoffee or lessee for life. **3. Black. Com. 206.** short, it lieth by the antient law, where the wrong or ejector is not himself in possession, but another claims under him.

F. N. B. 197. T. AND he shall recover his term again, and damages if the term be not ended; if it be ended then, all damages. Yet if the term expire pending the writ, the writ will not abate.

F. N. B. 198. U. THE process on the writ is summons, attachment, distress infinite, and not process of outlawry, because the writ is not *vi et armis*.

THIS writ was devised, as it is said, by "a wise man, F. N. B. 198.
 A. called *William Moreton*," who adopted it for the following reason. If a man had leased land for years, and after had ousted his lessee, and made a feoffment of the land, to a stranger in fee, the lessee could not have a writ of *ejectione firme* against the feoffee, because he did not put him out of possession; his only remedy being by entering again upon the land, and then if the feoffee put him out, the lessee might have a writ of *ejectione firme, vi et armis*, against him, for the wrong done him. But before entry he had no remedy against the feoffee; for he could not sustain an ejectment, no force having been used; and there could be no force where there was no entry: the lessee therefore was without remedy, any otherwise than by entering on the land; which he had authority to do by his lease. But sometimes men of opulence and power, BY FORCE, kept out their lessees, with whom they had contracted, and who dared not enter; in such case, the tenant was without an adequate remedy, until this writ was devised. It was devised by the equity of the statute of *Westminster 2. c. 24.* which enacts, that "as often as it shall happen in the chancery, that in one case a writ is found, and in like case, falling under the same law, and wanting the same remedy, none is found, the clerks of the chancery shall agree in making a writ."

YET if the lessor put out the lessee, and presently make F. N. B. 198.
 B. feoffment in fee, so as the feoffee be party or privy to the ouster of the lessee, the lessee shall have a writ of ejectment *vi et armis* against the feoffee; because he is party to the ouster, and to the wrong done him.

The writ:—

*Rex vic', &c. salutem: si A. fecerit, &c. tunc sum' &c. B. F. N. B. 198.
 &c. sit, &c. ostensus quare deservat' A. unum mes-* B.

suag'

suag' cum pertin. in N. quod C. ei dimisit, ad terminum qui nondum præterit; infra quem terminum, idem C. præfat' B. messuag' illud vendidit; occasione cujus venditionis idem B. præfat' A. de messuag' prædict' ejecit, ut dicitur; et habeas, &c.

F. N. B. 198. C. IT lieth where the son and heir of the lessor maketh a feoffment, &c. and the feoffee ousteth the lessee.

Id. 198. D. AND if the lessee grant over his term, and afterwards the lessor make a feoffment in fee of the land to a stranger, the second lessee may have this writ: and the writ shall be:

Quare deforc' præfat' B. unum messuag', &c. quod R. (C. L. illud dimisit ad terminum qui nondum præterit,) eidem B. dimisit ad eundem terminum, &c.

So, if four let a house to *A.* for years, who granted over his estate to *B.* and afterwards two of the lessors die, and the survivors make a feoffment to *C.* in fee; *B.* may have a *quare ejecit infra terminum* against the feoffee; but the writ must recite the special matter.

Id. 198. E. AND if a man lease land for years, and the lessor suffer a recovery to be had against him upon a feigned title, and the recoveror entereth, yet 'it seemeth that the lessee shall have this writ: and in such case, the words of the writ are, "*occasione cujus venditionis,*" and yet the same is not properly a sale. Those words are only words of form.

BEFORE the statute of 21. H. 8. c. 15. it seems that a tenant for years could not have falsified the recovery against his lessor; the reason is that, at the common law, tenants for years were only small interests, being generally from year to year; and termors were looked on merely

bail

bailiffs to the freeholders. These terms were only on contract, and if the termors were ejected, they only had remedy on their covenants, against their lessors. The statute of *Westm. 2.* which permitted the *quare ejecit infra terminum*, was the first statute which gave them remedy against their lessors, by a judgment to recover the term; for the ejectment was in the nature of an action of trespass, which gave them remedy in damages only, until 11. H. 7. when the *habere facias* began to be allowed. But though the writ *quare ejecit infra terminum*, was established as a remedy in the cases before mentioned, not only against the lessors, but against any person colluding with them, yet the lessees had no remedy against RECOVERERS at the common law; because they were not parties to the writ: (for no one was made party to the writ, unless he had a reversion interest;) and not being parties, could not be received to plead. To help this, the statute of *Glocester*, (c. 11.) provides, that "the termor shall make himself party to the writ, on default of the tenant, and shall be received to defend the title of the lessor, if he come in before judgment." This was not by any means a complete remedy; for still, if the lessor suffered a recovery by a feigned title, there was a record against the termor, which he could not traverse; his title therefore was destroyed, and he had remedy only in damages, on the covenants. To remedy so great an inconvenience, the statute 21. H. 8. c. 15. was made; and from thenceforth, in this action the lessor had set up a feigned title by recovery against the lessee, THAT did not destroy his action, and confine him to a writ of covenant; but he might reply to such recovery, if pleaded in bar, and shew that it was effected by collusion; and if given in evidence, might shew it was by collusion: thus he could recover the term itself, notwithstanding a collusive recovery.

Co. Lit. 46. a.
2. Inst. 321,
&c. but see
Plowd. 83.

F.N.B. 198.F. AND if a man lease lands for a term of years, and afterwards die without heir, and the lord by escheat enters and puts out the termor, it is a doubt whether he shall have a *quare ejecit infra terminum* against the lord by escheat: yet it seemeth reasonable that he should. The reason is, that the lord, by granting the estate to the tenant in fee-simple, granted him full power to alien or charge it; and where such estate escheats to the lord charged with a lease, it is only an escheat of the reversion upon that lease: for the power of alienation, which was given by infeudation, extends to all acts EXECUTED upon the estate: because such acts are, *in tanto*, an alienation. It does not however extend to such as are not actually executed; for there the lord comes in by title paramount and the estate can never be charged in the hands of the lord, by any act of the feudatory, unless it take place in the time of such feudatory, whereby the power of alienation is actually executed. Therefore a statute staple or merchant, &c. shall not bind the lord by escheat, unless the land be actually extended.

F. N. B. 198. G. So if a villein had leased land for years, and afterwards the lord of the villein had entered, and put out the termor, the lessee might have had this writ: because the villein was FREE, as to every body but his lord; if therefore he had leased land, before entry of the lord, the lessee had title. The reason was, that the lord gained title by entry, and until then the property was in the villein; for the villein having taken the estate by livery of seisin, *coram paribus*, the lord could not take it from him but by entry. If therefore the villein had entered before the lord, the lord could not have entered on the estate, because he could not enter on the property of a freeman. He could not therefore in this case have entered upon the lessee for years, in order to eject him: but it seems he might have entered to claim his reversion, which was still in his villein.

Co.Lit. 118.a.

Co.Lit. 119.a.

AND so if a man lease land for years, and afterwards a stranger puts out the lessee, and disseiseth the lessor, and afterwards the lessor releaseth to him, it seemeth that the lessee shall have the writ of *quare ejecit infra terminum* against the disseisor, &c.

AND it lies as well against the lessor, as against his cooffee. At the sale supposed in the writ is not traversable, but by the ejectment, &c. And if so, then it seemeth that the writ lieth against the lord by *escheat*, or against the lord of the villein, who putteth out the termor, &c.

BUT an *ejectione firmæ* lay against the lord of the villein, if he had put the termor out of his lease made by the villein, before entry made by the lord into the land. And an *ejectione firmæ* lieth against the lord by *escheat*, if he putteth out the termor of the lease made by the tenant, &c.

AND by the Book 19. H. 6. it appeareth, that it is the election of the lessee to sue a writ of *ejectione firmæ*, or a writ of *quare ejecit infra terminum*, against the lessor or his heir, or against the lord by *escheat*, or against the lord of the villein, if they put the termor out of his lease, &c.

It is plain therefore that the *quare ejecit infra terminum* lieth not only against the lessor himself, but against his heir, or any person who comes in, in the *per*; for they will not to oust the lessees who hold of them, having the reversion in themselves. And as tenant for life will not have a writ of entry against his lessor, or the reversioner, if he disseised him; so this writ was formed, that tenant for years might have remedy, if the lessor disseised him: and the rather in this case, because if no writ had been formed, the tenant would have had

THE LEGAL REMEDY BY EJECTMENT.

no specific remedy to recover the land itself. The action of covenant indeed would have run with the land, if the lessor had covenanted for himself, his heirs, and assigns; the remainder therefore ought to go to the feoffee because after the lease made, the conveyance of the land amounted in truth to no more than a grant of the reversion; of consequence the feoffee coming into the land on reversion, ought to be liable to the same action. The same law must govern touching the lord by escheat; coming in by escheat to the reversion, and not to the possession itself.

ALL these nice distinctions, as to this ancient writ, now of little consequence, inasmuch as since the introduction of fictitious ousters, by which the title may be tried against any kind of tenant, by whatever means he acquired the possession, the writ of *quare ejecit infra terminum* is fallen into disuse.

APPEND

APPENDIX.

No. I.

STATUTES.

THOUGH in the course of the preceding treatise, all the Statutes connected with the subject, are, in general, I trust, accurately cited, yet, for the convenience of the profession (when at a distance from home, and the authority itself not perhaps at command), it may be necessary to detail a few of them somewhat more at length.

By 4. H. 7. c. 24. to strengthen the assurance by *fine*, it is ordained, that "after the ingrossing of every fine to be levied in the king's court afore his justices of the common pleas, of any lands, tenements, or any other hereditaments, the same fine be openly and solemnly read and proclaimed in the same court the same Term, and in three Terms then next following the same ingrossing, in the same court, at *four* * several days in every Term, and in the same time that it is so read and proclaimed, all pleas to cease. And the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same, EXCEPT women *covert*, other than be parties to the said fine, and every person then being within age of twenty-one years, in prison, or out of this realm, or not of whole mind, at the time of the said fine levied, not parties to such fine. And saving to every person or persons, and to their heirs, other than the parties in the said fine, such right, claim, and interest, as they have to or in the said lands, tenements, or other hereditaments, at the time of such fine ingrossed; so that they pursue their title, claim, or interest, by way of *action* or *lawful entry*, within five years next after the same proclamations had and made. And also saving to all persons such action, right, title, claim, and interest, in or to the said lands, tenements, or other

* Reduced to once in each Term by 31. El. c. 1.

hereditaments, as first shall grow, remain, or descend or come to them, after the said fine ingrossed and proclamations made, by the force of any gift in the tail, or by any other cause or matter hereunto made before the said fine levied; so that they take their action, or pursue their said right and title, according to law, within five years next after such action, right, title, claim, or interest to them accrued, descended, remained, fallen, or come. And that the said persons and their heirs may have their said action against the pernor of the profits of the said lands and tenements and other hereditaments, at the time of the said action to be taken. And if the same persons, at the time of such action, right, and title accrued, descended, remained, or come unto them, be *covert de baron*, or within age, in prison, or out of this land, or not of whole mind, then it is ordained, that their action, right, and title, be reserved and saved to them and their heirs, until the time they come and be at their full age of twenty-one years, out of prison, within this land, *uncovert*, and of whole mind; so that they or their heirs take their said actions or their lawful entry, according to their right and title, within five years next after that they come and be at their full age, out of prison, within this land, *uncovert*, and of whole mind, and the same actions pursue, or other lawful entry take according to law. And that all such persons as be *covert de baron*, not party to the fine, and every person being within age of twenty-one years, in prison, or out of this land, or not of whole mind, at the time of the said fines levied and ingrossed, and by this act afore except, having any right or title, or cause of action, to any of the said lands and other hereditaments, that they, or their heirs inheritable to the same, take their said actions or lawful entry, according to their right and title, within five years next after they come and be of age of twenty-one years, out of prison, *uncovert*, within this land, and of whole mind; and the same actions sue, or their lawful entry take and pursue, according to the law; and if they do not take their actions and entry as is afore said, then they and every of them and their heirs, and the heirs of every of them, be concluded by the said fines for ever, in like form as they be, that be parties or privies to the said fines. Saving to every person or persons not party nor privy to the said fine, their exception to avoid the same fine by that, that those which were parties to the fine, nor any of them, nor no person or persons to their use, ne to the use of any of them, had nothing in the lands and tenements comprized in the said fine, at the time of the said fine levied. And every fine that hereafter shall be levied, in any of the king's courts, of any manors, lands, tenements, and other possessions after the manner, use, and form that fines have been levied afore the making of this act, be of like force, effect, and authority as fines so levied be or were afore the making of this act; this act, or any other act in this present parliament made or to be made, notwithstanding. And every person shall be at liberty to

every any fine hereafter, at his pleasure, whether he will after the form contained and ordained in and by this act, or after the manner and form aforetime used."

Doubts having been entertained, whether the general words of this act extended to bar the issue *in tail*, upon a fine levied by an ancestor, and though by the opinion of five Judges against three (19. H. 8.) it was held in the affirmative, yet it was afterwards thought necessary to obviate those doubts by the authority of parliament; for which purpose an act (32. H. 8. c. 36.) was passed, making the fine "a sufficient bar against persons, and their heirs, claiming by force of intail."

Of the operation of a fine, whether by common or statute law, is not the object of this treatise to enquire at large. So far as respects the action of ejectment, it is necessary to observe, that in general it bars the right of entry. If levied by tenant in tail, *in possession*, it operates as a discontinuance of the estate-tail; so that the remainder-man, or reversioner, is barred of his entry, and has only a right of action left. But there are several cases in which a fine does not operate as a discontinuance of an estate-tail; and where it does, the party *discontinuing* must be actually seized by force of the intail. Tenant in tail need not however be in the actual possession of the estate-tail, in order to be capable of barring his issue by a fine. And no fine is a Cruise, 160, to an estate-tail, but one levied with proclamations, pursuant to the statute.

Terms for years may be barred by a fine and non-claim, if the lessees were, or ever might have been, in possession. There are some persons, some estates, and some interests, upon whom and against which a fine does not attach. As for instance, the king; ecclesiastical corporations; estates not descended; a rent in possession of a third person; a right of way; a right of common; a remainder, or reversion expectant on an estate-tail, unless the estate-tail be discontinued; estates-tail, of the gift of the crown; a springing or shifting use; a title of honour.

Two things also seem necessary to the efficacy of a fine. 1. The person meant to be affected by it, must be out of possession. 2. The party levying it, should not only have possession, but a possession adverse to and inconsistent with that of the person to be barred: for if the possession of the party levying be consistent with that of any other person, such other person will not be prejudiced by it.

Though a fine can only be reversed by writ of error, yet its effects may be avoided, either by a real action, or an actual law-entry, or continual claim, within the time limited by the statute. The action must be, strictly speaking, a real action; for an ejectment will not answer the purpose. So a bill filed in chancery is no claim to avoid a fine; which was determined in *Watson v. Leman*. That was a trial at bar, in ejectment, brought

in Trinity Vacation 1773. The counsel for the defendant produced a fine between *Robert Leman*, clerk, plaintiff, and *William Leman* (the now defendant), deforciant, of the premises, levied Hilary Term 1765, with proclamations indorsed which they insisted, operated as a bar, on and after the 25th of November 1770, three years before the action was brought. For the plaintiff it was insisted, 1st, that both the fine and possession of the estate were fraudulent, and therefore void. But on such fraud no evidence was offered. 2dly, that a bill in chancery had been filed within the time of limitation, which was equivalent to a legal claim. But by DE GREY, Chief Justice: "At the common law a man might claim against a fine at any time before judgment; but *Fleta*, who wrote after 18. Edw. 1. refers to the year and day mentioned by the statute of that year." At that time there were three ways of putting in a claim, to avoid a fine: 1. By *precipe quodd reddat*, or bringing a real action. 2. By entering the claim on the record at the foot of the fine; which leads to an observation, that there is a mistake in the English translation of the statute of 18. Edw. 1. s. 2. called *modus levandi fines*, in the last section: "if they make not their claim of their action within a year and a day before the country;" as if the original had been, "*ils ne mettront leur claim de leur action PUR LE PAYS*," as it is printed in *Inst.* 511. whereas in the latter editions of the statute, corrected by the Roll, it is "*SUR LE PIE*," upon the foot of the fine. 3. By an actual entry on the lands; or if that was impracticable, then by what was esteemed equivalent, viz. continual claim. The statute of 34. Edw. 3. c. 16. took away the bar of non-claim intirely, and left the parties at liberty, any time, to falsify the fine. But the statute of 4. Hen. 7. restores the doctrine of non-claim; though in somewhat different shape. There is now no such thing as claiming on the foot of the fine. As to the present question, whether a bill in chancery be a claim under the statute of Hen. 7. (which requires it to be by way of action, or lawful entry), most clearly it is not within the letter of it. A bill in equity is no action. Nor is the question a new one. *Catlin*, Chief Justice, in 16. Eliz. lays it down, that "a claim to avoid a fine by bill in the chancery, is not sufficient; but it must be by an action." The true rule is, that the claim must be of such a nature as corresponds with the estate. A bill therefore no entry by *cestuy que trust*, no claim or other legal action is sufficient to avoid a fine, or suspend the bar by non-claim, a fine levied of a trust estate; but it must be by bill in chancery. Though if you sue for relief against fraud in the conveyance of a legal estate, a fine and non-claim is a bar in the court of chancery.—The plaintiff was nonsuited. If the right of entry be taken away, and a right of action only remains, as where a fine operates as a discontinuance, an actual entry will not avoid the fine, but a real action must be commenced. But no entry is necessary where the fine is levied

2. *Inst.* 518.

1. *Dalif.* 116.

1. *Chan. Ca.* 268. 278

2. *Chan. Rep.* 326.

1. *Jon.* 416.

Anle. 42.

2. *Yern.* 212.

without proclamations, at common law; for the statute 4. H. 7. *statute, 198.*
 does not extend to such a fine, which may be avoided at any time
 within twenty years. Except the special case of fines with pro-
 clamations, and the construction of the 4. H. 7. c. 24. in aid of
 the bar, there is not perhaps a case, where the owner, whose
 entry is not taken away, may not *ele. 7* (by pursuing the possessory 1. Bur. 112.
 remedy by ejectment) to be deemed as *not* having been disseised: *Ante, 54.*
 for the consequences of *actual* disseisin, considered as *such*, con-
 tinue law to this day.

And as to fines levied with *proclamations*, it is, by 4. Ann. c. 16,
 16. enacted, that "no claim or entry to be made, of or upon any
 lands, &c. shall be of any force or effect to avoid any fine levied,
 or to be levied, with proclamations, according to the statute; or
 shall be a sufficient entry or claim within the statute of Limita- 31. Jac. 1.
 tions, unless upon such entry or claim an action shall be com- c. 16.
 menced within one year next after the making of such entry or
 claim, and prosecuted with effect."

So a fine may be avoided for fraud, and that either by writ of
disseisin, or by averment, stating the fraud or covin. So, by aver-
 ment of fraud in consequence of 27. El. c. 4. when levied to 3. Rep. 30.
 secret uses, for the purpose of deceiving purchasers; or of *usury*, Touch. 12.
 under 13. El. c. 8. Jeak. 254.

In *Lord Townsend v. Ash et Uxor.* it was objected, that the de- 3. Atk. 336.
 endants, who had levied a fine, had no *seisin* to warrant it.—
 LORD HARDWICK. "I am of opinion, if they had not, courts
 of law will not presume or strain a point to work a wrong; and
 no favour is allowed in construction in such a case. Then what
 kind of possession had *Ash* and *his Wife*, at the time of the fine?
 Both sides agree it to be a legal estate, that there was no entry
 made, and nothing but *perception of rents and profits*. It has
 been said the entry should be as notorious as possible; but if they
 had taken out water, or dug the soil, it would not do to gain
seisin in a wrong-doer; for in a wrong-doer, doing the acts of
 a rightful owner, is not sufficient to gain possession; for if a man
 enters on my tenant, he does not gain such a possession to levy a
 fine thereon, unless he *CONTINUES* in possession; for a wrong-
 doer, to gain possession by *disseisin*, must not step on the land,
 withdraw, and leave the rightful owner in possession; which
 would be sufficient to gain *seisin* on a feoffment, but *not* to levy
 a fine. As to the rents and profits, it is said the perception of
 them is a sufficient *seisin*; but it is answered, there was in fact
 no receipt till *after* the fine levied: if they had received the
 rents in the present case before the fine, it would be a disseisin.
 In the case of *Blunden v. Baugh*, it was held, that receipt of Hob. 322.
 rent from the tenant may be a disseisin, or not, at election; but *Ante, 53.*
 if they go on to receive the rents, and levy a fine, it shews *quo*
modo hoc fecerit, and is not a receipt as bailiff or receiver. The
 evidence of receipt of rent, if the jury had believed it, would be
 sufficient possession to levy a fine; and so held in *Dormer v. For-*
bes. The law allows of fictions and relations to support a
 right,

right, but never to work a wrong. If a person has a right, and is kept out by terror, a claim is sufficient. The fine therefore can have no operation to change the right of the parties. There is no colour to support it as a fine and non-claim, as operating upon a disseisin."

By stat. 21. Jac. 1. c. 16. for limitation of actions, and avoiding suits in law, it is enacted, that "no person or persons shall at any time hereafter make any entry but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."

Ante, 58. 202.
341.

"Provided, that if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of one-and-twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person and persons, his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same."

Since the printing of that part of this treatise which relates to the statute of Limitations, I have been favoured with the following case, from the manuscript of Mr. Serjeant BOND.

Orrell v. Maddox.

EJECTMENT for lands at *Depford* in *Kent*.—The lessor of the plaintiff claimed the estate, as heir at law of *John Walthew* and *Edmund Walthew*, who had granted long leases of the premises in question. *John Walthew*, together with *Edmund Walthew* (nephew to *John*) were seised in fee, as parceners in gavelkind of the lands in question; and, on 11 June 1678, leased the premises to *John Hall* for 71 years, at 6l. 10s. rent; and on 22 April 1692, again leased the premises to *Ann Hall*, who had succeeded the original lessee, for 40 years, to commence from 1749 at the same rent. The lease was traced down by several assignments to the 4th March 1742, when it was assigned by the assignee of the lease, to one *Robert Tew*, from whom the ancestor of Mr. *Maddox* had obtained possession. These leases expired 11 June 1789, on which one *Elizabeth Ellerbeck* had entered, in the name of herself and the lessor of the plaintiff; and Mr. *Maddox* the defendant had brought an ejectment, claiming not only under the assignment of *Tew*, but also under a conveyance of the reversion by lease and release from the heirs of Dame *Elizabeth*.

Blandell, who he stated was the heir of John and Edmund Wal-
 thew. Elizabeth Ellerbeck having no evidence, called no wit-
 nesses, and Maddox recovered the premises on a trial before
 GOULD, J. at Maidstone, Lent 1791. Mrs. Ellerbeck, being
 thrown into gaol for the costs, died there, and the present lessor
 of the plaintiff, her sister, having obtained friends, made an entry,
 and brought the present ejectment, which came on to be tried
 before HOTHAM, B. at Maidstone, Lent assizes, 1794. The
 lessor of the plaintiff, having given evidence of the above leases,
 proved a descent by parish registers and Fleet marriages, from
 Elizabeth Waltherw (of Kidbrooke, a hamlet in Deptford parish);
 and by the baptism of the said Elizabeth it appeared she was
 daughter of Mr. Waltherw; and it was shewn, that Henry Waltherw
 of Deptford was eldest brother of John Waltherw, and uncle
 of Edmund Waltherw, the lessors of the two original leases.
 And this Henry Waltherw, having lived at Deptford, was insisted
 to be the father of the said Elizabeth, of Kidbrooke. For defendant
 was objected, that supposing the pedigree sufficiently proved,
 there was a rent of 6l. 10s. reserved on the two original leases,
 the lessor of the plaintiff must shew that she herself, or some of
 the several ancestors from whom she derived her title and descent,
 from Elizabeth, of Kidbrooke, had received that rent within twenty
 years, previous to the commencement of the action. And
 HOTHAM, B. thinking that was necessary to prove a possessory
 title, the rent being in lieu of the land, thought the objection
 was fatal, and upon it nonsuited the plaintiff. *Easter Term,*
1794, K. B. it was moved by BOND, Serjeant, to set aside the
 verdict. He said, it was a general question, whether a person,
 seized of a reversion, expectant on a term for years, is bound
 in order to entitle himself to recover in ejectment) to shew,
part of his case, that he has actually been possessed, within any
 particular limits, of the rents reserved upon the leases. He said,
 it would be admitted, if nothing was reserved, he could not be
 expected to shew any thing was received. But as fealty was at
 the implied service in all tenancies, if no rent, the party
 must shew he had received fealty; or if a pepper-corn was only
 reserved, he must prove seisin of it. He said, nothing of this
 was to be found in the statute of Limitations, which alone could
 have given birth to this supposed rule. That 21. Jac. 1. c. 16.
 only directed, that the entry must be made within twenty
 years after the title accrued. And as ejectment only lay where
 the title of entry was found, the ejectment only could be brought
 within twenty years. That here, the leases expired in June
 1799, consequently the ejectment being brought within twenty
 years after the title accrued, the statute was satisfied. He con-
 sidered, that all reference or analogy to this statute was false,
 and that there was no rule of law which authorised the defendant's
 objection. He said, if the rent had not been received, the same
 would have been taken away the remedy by action of debt, after six
 years, but not the right. The right remained to the rent; and
 accor-

according to Sir W. FOSTER, in 8. Co. 64. the older statute of Limitations did not apply to a rent reserved by deed. S. P. 2. Vern. 335. The proof of payment was not a requisite or direct point to be prepared to prove in this action: he don't undertake to make out he is intitled to the rent; he only is to shew *he is intitled to the possession, the term being elapsed*. In real actions, sometimes *espées* are part of demandant's case, as in a writ of right; but in others, as in *cessavit*, or *escheat*, where they claim a seignory or reversion, none are alledged. Bro. *Expées* 5. Several special verdicts in ejectment may be looked at. Where plaintiff's whole proof set out, not necessary to shew seisin of rent reserved, when reversioner claimed after a long lease rendering rent. *Hart v. Brown*, Sal. 339. He said he was nonsuited. That probably in the whole case it might have appeared, that the plaintiffs were not intitled; and non-receipt of rent in that line of descent plaintiffs claimed, might operate as a consideration or presumption for the jury to go on, and lead them to suppose the right was not in the plaintiff; but if defendants had shewn this, the plaintiffs might have rebutted such a presumption, by evidence in reply; and that at all events, not receiving the rent was only question for the jury, and could not warrant a *nonsuit*; as it was as necessary a requisite as proof of a conversion in trover, of *espées* in a writ of right. The Court set aside the nonsuit Lord KENYON going very much on BOND's argument. The cause was tried before Lord KENYON, Sum. 1794, when defendants had a verdict, on the defect of plaintiff's pedigree, as a fair conclusion from all the circumstances; that Dame *Elizabeth Blundell*, under whom *Maddox* claimed, was heir of the *Whitbrow*, and not *Elizabeth*, of *Kidbrooks*.

Ante, 422.

Ante, 421.

By 16. and 17. Car. 2. c. 8. it is enacted, that "in writ of error to be brought upon any judgment after verdict, in an action of *ejectione firmæ*, no execution shall be thereupon thereby stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such action of *ejectione firmæ*, in such reasonable sum as the court, to which such writ of error shall be directed, shall think fit; with condition, that if the judgment be affirmed, the writ of error discontinued, the plaintiff be nonsuit in such writ of error, that then the plaintiff shall pay such costs, damages, and sum and sums of money as shall be awarded upon or after such judgment affirmed, continuance or nonsuit hall."

"And that the same may be ascertained, the court where such execution ought to be granted upon such affirmation, continuance, or nonsuit, shall issue a writ to enquire, as well the mesne profits, as of the damages by any waste committed after the first judgment in *ejectione firmæ*; and upon return thereof, judgment shall be given, and execution awarded for such mesne profits and damages, and also for costs of suit."

Made perpetual by 22. and 23. Car. 2. c. 4.

By 29. Car. 2. c. 3. for prevention of frauds and perjuries, it *Leases.*
 is enacted, that "all leases, estates, interests of freehold, or
 terms of years, or any uncertain interest of, in, to or out of any
 messuages, &c. made or created by livery and seisin only, or by
 parol, and not put in writing and signed by the parties so making
 or creating the same, or their agents thereunto lawfully autho-
 rized by *writing*, shall have the force and effect of leases or
 estates at will only, and shall not, either in law or equity, be
 deemed or taken to have any other or greater force or effect.
 Except all leases not exceeding the term of three years from the Sect. 2.
 making thereof, whereupon the rent reserved to the landlord
 during such term, shall amount unto two third parts at the least,
 of the full-improved value of the thing demised. And that no
 leases, estates, or interests, either of freehold or terms of years, Sect. 3.
 or any uncertain interest (not being copyhold or customary
 interest), of, in, to, or out of any messuages, &c. shall be
 assigned, granted, or surrendered, unless by deed or note in
 writing, signed by the party so assigning, granting, or surren- *Assignments.*
 dering the same, or their agents thereunto lawfully authorized
 by writing, or by act and operation of law. That no action Sect. 4.
 shall be brought whereby to charge any person upon any contract Contract for
 or sale of lands, tenements, or hereditaments, or any interest in sale of lands,
 or concerning them; or upon any agreement that is not to be &c.
 performed within the space of one year from the making
 thereof; unless the agreement upon which such action shall be
 brought, or some memorandum or note thereof, shall be in writ-
 ing, and signed by the party to be charged therewith, or some
 other person thereunto by him lawfully authorized. And that Ante, 293.
 all declarations or creations of trusts or confidences of any lands, Sect. 7.
 &c. shall be manifested and proved by some writing signed by the *Trusts.*
 party who is by law enabled to declare such trust, or by his last
 will in writing, or else they shall be utterly void, and of none
 effect. Provided always, that where any conveyance shall be Sect. 8.
 made of any lands or tenements, by which a trust or confidence
 shall or may arise or result by implication or construction of
 law, or be transferred or extinguished by an act or operation of
 law, then and in every such case, such trust or confidence shall be
 of the like force and effect as the same would have been, if this
 statute had not been made. And that all grants and assignments Sect. 9.
 of any trust or confidence shall likewise be in writing, signed by
 the party granting or assigning the same, or by such last will or
 devise, or else shall likewise be utterly void, and of none effect. Ante, 332.
 And for the amendment of the law in the particulars following,
 it is enacted, that from henceforth any estate *pur auter vie* shall
 be devisable by a will in writing, signed by the party so devising
 the same, or by some other person in his presence, and by his
 express directions, attested and subscribed in the presence of the
 devisor by three or more witnesses: and if no such devise thereof
 be made, the same shall be chargeable in the hands of the heir,
 if

Sect. 11.

Estate *pur**auter vie.*

Sec 14. G. 2.

c. 20. and post.

- if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple: and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands. And whereas it hath been found mischievous that judgments in the king's courts at *Westminster* do many times relate to the first day of the Term whereof they are entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged, or suffered and signed in the Vacation time after the said Term, whereby many times purchasers find themselves aggrieved: Be it enacted, that any Judge or officer of any of his majesty's courts of *Westminster* that shall sign any judgments, shall at the signing the same, without fee for doing the same, set down the day of the month and year of his so doing upon the paper book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margin of the roll of the record where the said judgment shall be entered. And such judgments as against purchasers *bonâ fide*, for valuable consideration of lands to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be signed, and shall not relate to the first day of the Term whereof they are entered, or the day of the return of the original, or filing the bail. That the day of the month and year of the enrolment of the recognizances shall be set down in the margin of the roll where the said recognizances are enrolled; and no recognizance shall bind any lands, &c. in the hands of any purchaser *b. nâ fide*, and for valuable consideration, but from the time of such enrolment. And for prevention of fraudulent practices, in setting up nuncupative wills, be it enacted, that no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least), that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them bear witness that such was his will, or to that effect; nor unless such will were made in the time of the *last sickness* of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling. And that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof were committed to writing within six days after making the will. And that no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen days at the
- Sect. 13.
Judgments.
- Sect. 14.
- Sect. 15.
- Sect. 18.
Recognizances.
- Sect. 19.
Nuncupative wills.
Post, 463.
- Sect. 20.
- Sect. 21.

after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same if they please. And that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any devise, or bequest, therein be altered or changed by any words, or will by word of mouth only, except the same be in the presence of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least. Provided always, that any soldier, being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act. Sect. 22.

By 4. Ann. c. 16. s. 8. it is enacted, that "in any actions depending in any courts of record at Westminster, where it shall appear to the court in which such actions are depending, that it will be proper and necessary that the jurors who are to try the issues in any such actions, should have view of the place in question, in order to their better understanding the evidence that shall be given upon the trials of such issues, in every such case in the respective courts in which such actions shall be depending, by order special writs of *distingas* or *babeas corpora* to issue, by which the officer to whom the writs shall be directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before trial, who then and there shall have the matters in question shewn to them by two persons in the writs named, to be appointed by the court: and the officer who is to execute the writs shall, by a special return made in the same, certify that the view hath been had according to the command of the said writs. That all grants or conveyances of land or tenements, or of any messuages or houses, or of the reversion or remainder of any messuages or houses, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of any such messuages or houses, and out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made. Provided, that no such tenant shall be prejudiced by payment of any rent to any such landlord or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusor or grantee. That all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to the validity of any nuncupative will, or any thing relating thereunto. Sect. 9.

Attornment. Sect. 10. Sect. 14. Witnesses to nuncupative wills. Ante, 461. Sect. 15. Whereas it hath been doubted, whether the declarations or creations

*Declarations
of uses, &c.*

*Sect. 21.
Warranties.*

View.

1. Burr. 252.

creations of uses, trusts, or confidences, of any fines or common recoveries, manifested by deed, made after the levying or suffering of such fines or recoveries, are good and effectual in law. It is hereby declared, that all declarations or creations of uses, trusts, or confidences, of any fines or common recoveries of lands, tenements, or hereditaments, manifested and proved, which hereafter shall be manifested and proved, by any deed already made, or hereafter to be made, by the party who is by law enabled to declare such uses or trusts, after the levying or suffering of any such fines or recoveries, are and shall be good and effectual in the law. That all warranties which shall be made, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect; and likewise all collateral warranties, which shall be made of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against the heir."

By 3. Geo. 2. c. 25. s. 14. it is provided, that "where a view shall be allowed in any cause, six of the jurors named in the panel, or more, who shall be mutually consented to, by the parties or their agents on both sides, or if they cannot agree, shall be named by the proper officer of the courts, for the cause, or need be by a Judge of the court where the cause is depending, or by the Judge or Judges before whom the cause shall be brought on to trial respectively, shall have the view, and shall be sworn, or such of them as appear upon the jury to try the cause before any drawing; and so many only shall be drawn to be added to the viewers who appear, as shall, after all defects and challenges allowed, make up the number of twelve, to be sworn for the trial of such cause."

Ante, 159.

By 4. Geo. 2. c. 28. it is enacted, that "in all cases between landlord and tenant, as often as it shall happen that one year's rent shall be in arrear, and the landlord or lessor to whom the same is due, *bath right by law to re-enter for non-payment thereof*, such landlord or lessor shall and may, without formal demand or re-entry, serve a declaration in ejectment for recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any dwelling-house; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration of ejectment; and such affixing shall be deemed legal service thereof: which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and re-entry in case of judgment against the casual ejector, or nonsuit for confessing lease, entry, and ouster, it shall be made appealable to the court where the said suit is depending, by affidavit,

moved upon the trial, in case the defendant appears, that half
 year's rent was due before the declaration was served, and
 that no sufficient distress was to be found on the demised pre-
 mises, countervailing the arrears then due, and that the
 lessor in ejectment had power to re-enter; in every such
 case, the lessor in ejectment shall recover judgment and execu-
 tion, in the same manner as if the rent in arrear had been le-
 gally demanded, and re-entry made; and in case the lessee,
 or other person claiming under the lease, shall permit judgment
 to be recovered on such ejectment, and execution to be executed
 thereon, without paying the rent and arrears, together with full
 costs, and without filing any bill for relief in equity, within six
 calendar months after such execution executed; in such
 case, the lessee, and all other persons claiming under the lease,
 shall be barred from all relief in law or equity, other than by
 writ of error, for reversal of such judgment, in case the same
 be erroneous; and the landlord or lessor shall from thence-
 forth hold the demised premises discharged from such lease;
 and if on such ejectment verdict shall pass for the defen-
 dant, or the plaintiff be nonsuited therein, except for de-
 fendant not confessing lease, entry, and ouster, then such
 defendant shall recover full costs. Not to extend to bar the
 right of any mortgagee of such lease, or any part thereof,
 who shall not be in possession, so as such mortgagee do,
 within six calendar months after such judgment obtained, and
 execution executed, pay all rent in arrear, and all costs and da-
 mages sustained by such lessor, person or persons entitled to the
 reversion or reversion as aforesaid, and perform all the cove-
 nants which on the part of the first lessee ought to be performed.
 And in case the lessee, or other person, claiming any right,
 title, or interest, in law or equity, of, in, or to the lease, shall,
 within the time aforesaid, file one or more bill or bills, for
 relief in any court of equity, such person shall not have
 injunction against the proceedings at law on such eject-
 ment, unless he do, within forty days next after a full and
 true answer by the lessor of the plaintiff in such eject-
 ment, bring into court such sum of money as the lessor of
 the plaintiff in the ejectment shall, in his answer, swear to be
 due in arrear, over and above all just allowances, and also the
 costs taxed in the said suit; there to remain till the hearing of
 the cause, or to be paid out to the lessor or landlord on good se-
 curity, subject to the decree of the court; and in case such bill
 shall be filed within the time aforesaid, and after execu-
 tion executed, the lessor of the plaintiff shall be accountable
 for so much, and no more, as he shall really, without fraud,
 or wilful neglect, make of the demised premises from the
 time of his entering into the actual possession thereof; and if
 the same shall be so made by the lessor of the plaintiff, happen to be
 less than the rent reserved on the lease, then the lessee, before he
 be restored to possession, shall pay such lessor or landlord
 the money so made fell short of the reserved rent.

H h

.. And

" And if the tenant, or his assignee, shall, at any time before trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, his, her, or their attorney in that cause, or pay into the court where the cause is depending, all the rent and arrears, together with the costs, then all further proceedings on the ejectment shall cease; and if such lessee, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid be relieved in equity, he, she, and they, shall enjoy the demised lands, according to the lease thereof made.

Ante, 167.

By 11. Geo. 2. c. 19. it is enacted, that " every tenant whom any declaration in ejectment shall be delivered, shall forthwith give notice thereof to his or her landlord, his, her, their bailiff or receiver, under penalty of forfeiting the value three years improved or rack-rent of the premises so in possession of such tenant, to the person of whom he or she holds to be recovered by action of debt.

" And it shall be lawful for the court where such ejectment shall be brought, to suffer the landlord to make himself defendant, by joining with the tenant, to whom such declaration shall be delivered, in case he shall appear; but in case the tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord of any part of the lands, &c. for which the ejectment was brought, shall desire to appear by himself, or consent to enter into the like rule, that by the course of the court the tenant in possession, in case he had appeared, ought to have done, then the court where such ejectment shall be brought shall and may permit such landlord so to do, and order a stay of execution upon such judgment against the casual ejector, and they shall make further order therein."

1. Burr. 116. By stat. 14. Geo. 2. c. 20. to amend the law concerning common recoveries (a statute *retrospective* and *declaratory*, which seems to have restored the original tenant to *præcipe*; and proceeds upon the parties to a recovery having power to suffer it), it is enacted, that " all common recoveries suffered, or to be suffered, of any manors, lands, tenements, or hereditaments, without any surrender or surrenders of conveying the lease or leases (a), or without the concurrence of, or any conveyance or assurance from such lessee or lessees, or other person or persons claiming under such lessee or lessees, in order to such recoveries have been or shall be had or suffered, shall as valid and effectual as if such lessee or lessees, or any person or persons claiming under him, her, or them, had conveyed, or joined in conveying, or shall convey, or join in

Common recoveries to be valid, without conveying the freehold.

(a) Namely, " leases for life, or lives under particular reversion served."

veying, a good estate of freehold to such person or persons as has or have been, or shall become, tenant or tenants to such writs of entry, or other writs, whereupon such common recoveries have been or shall be suffered.

" Not to extend to make any common recoveries valid and effectual, unless the person or persons intitled to the first estate for life, or other greater estate (in case there be no such estate for life in being, in reversion or remainder next after the expiration of such leases), has or have, by some lawful act or means, conveyed or assured, or joined in conveying or assuring, or shall, by some lawful act or means, convey or assure, or join in conveying or assuring, an estate for life at the least, to such person or persons as has or have been, or shall become, tenant or tenants to the writs of entry, or other writs, whereupon such common recoveries have been or shall be suffered. *Proviso.*

" Nor to prejudice the estate of such lessee or lessees, or any person or persons claiming any interest under such lessee or lessees. *Proviso.*

" And where any person or persons hath or have purchased, or shall purchase, for a valuable consideration, any estate or allowed in estates, whereof a recovery or recoveries is, are, or were necessary to be suffered in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds, making a tenant to the writ or writs of entry, or other writs for suffering a common recovery, and declaring the uses of a recovery; and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts, be deemed good and sufficient evidence for such purchaser, and those claiming under him, that such recovery was duly suffered and perfected according to the purport of such deeds, in case no record can be found of such recovery, or the same should appear not to be regularly entered on record: Provided, that the person making such deeds, and declaring the uses of a common recovery, had a sufficient estate and power to make a tenant to such writ as aforesaid, and to suffer such common recovery. *Proviso.*

" And to render common recoveries more effectual, every common recovery already suffered, or hereafter to be suffered, shall, after the expiration of twenty years from the time of suffering thereof, be deemed valid to all intents and purposes, if it appears, upon the face of such recovery, that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate and power to suffer the same; notwithstanding the deed for making the tenant to such writ should be lost or not appear. *Common recoveries not deemed valid, twenty years after.*

" And every recovery already suffered, or hereafter to be suffered, shall be deemed valid to all intents and purposes, notwithstanding the fine, or deed or deeds, making the tenant to such writ, should be levied or executed after the time of the deed executed after the time. *Recovery good, though deed executed after the time.*

judgment given in such recovery, and the award of the writ of seisin as aforesaid; provided the same appear to be levied or executed before the end of the Term, great session, session, or assizes, in which such recovery was suffered, and the persons joining in such recovery had sufficient estate and power to suffer the same.

Proviso.

"Provided, that nothing in this act contained shall be construed to prejudice or affect any question of law which may arise upon common recoveries not remedied, or intended to be remedied by this act; but all such common recoveries shall remain and be of such force and effect, as the same would have been if this act had never been made, and of no other force or effect.

Ante, 641.

"And whereas, by an act made in the twenty-ninth year of the reign of king *Charles* the second, it is enacted, that estates *pur autre vie*, whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and should be assets in their hands: and whereas doubts have arisen, where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners are fully satisfied, shall belong: be it enacted, that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made, according to the said Act, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate."

Surplus of personal estates how to pals, if not devised.

See 35. Geo. 3. c.

By 23. Geo. 3. c. 58. it is enacted, that "for every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any agreement shall be ingrossed, written, or printed, whether the same shall be only evidence of the contract, or obligatory upon the parties from being a written instrument, there shall be charged a stamp duty of six shillings." Not to extend to "any memorandum or agreement for any lease at rack-rent, of any messuage under the yearly value of five pounds: or to charge any memorandum or agreement, where the matter of memorandum or agreement, shall not exceed the sum of twenty pounds." No memorandum or agreement "shall be deemed to be void, in case the same shall be stamped at the head office, or the said duty be paid thereon, and a receipt given thereon for the same, by the proper officer receiving such duty, within *twenty-one days* after the same shall have been entered into."

Sect. 4.

Sect. 5.

The commissioners will stamp the agreement *after* the twenty-one days have expired, on paying a penalty of five pounds and the imposed duty of six shillings; though by what authority they can legally do it, for a default within *this* act, I am at a loss to discover; unless it be conceived that the sixth and twelfth sections have that operation. But see the case of *Ford v. Crompton*, in the second volume of *Brown's Chancery Cases*.

No. II.

And lease in ejectment, where the premises are not inhabited; to recover the possession.

THIS indenture made the 17th day of *May*, in the 19th year of the reign of our sovereign lord *George the third*, by the grace of God, of *Great Britain, France, and Ireland*, king, defender of the faith, &c. and in the year of Our Lord 1780, between *John Andrews*, of, &c. of the one part, and *John Lilly*, of, &c. of the other part, witnesseth, that he the said *John Andrews*, for divers good causes and considerations him thereunto moving, hath demised, granted, and to farm letten, and by these presents hath demise, grant, and to farm let unto the said *John Lilly*, all that his messuage or tenement commonly called or known by the name of, &c. situate, lying, and being in *street*, in the parish of, &c. in the county of, &c. and late in the possession of *Henry Duncomb*; to have and to hold the said messuage or tenement, with the appurtenances, from the date of these presents, for and during, and until the full end and term of five years from thence next ensuing, and fully to be compleat and ended: Provided always, and upon condition, that if the said *John Andrews*, his executors or administrators, shall, at any time after the 30th day of this present month of *May*, tender to the said *John Lilly*, his executors or administrators, one shilling, then this present indenture, and every thing therein contained, shall be void, and of none effect; any thing herein contained to the contrary in anywise notwithstanding. In witness whereof the said parties to these presents have hereto interchangeably set their hands and seals the day and year first above written.

Scaled and delivered,
being first duly stamped,
in the presence of

N.B. This deed requires a stamp.

No. III.

Proceedings on an action of trespass in ejectment, by original, in the King's Bench.

§ 1. *The original writ.*

GEORGE the second, by the grace of God of *Great Britain, France, and Ireland*, king, defender of the faith, and so forth; to the sheriff of *Berkshire*, greeting. If *Richard Smith* shall

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shall give you security of prosecuting his claim, then put by good and safe pledges *William Stiles*, late of *Newbury*, gentleman, that he be before us on the morrow of *All Souls*, wheresoever we shall then be in *England*, to shew wherefore with force and arms he entered into one messuage, with the appurtenances, in *Sutton* which *John Rogers*, esquire, hath demised to the aforecited *Richard*, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said *Richard*, and against our peace. And have you there the names of the pledges, and this writ. Witness ourself at *Westminster*, the twelfth day of *October*, in the twenty ninth year of our reign.

**Sheriff's re-
turn.**

Pledges of prosecution, { *John Doe,*
The within-named *Richard Roe.*
William Stiles is attached { *John Den,*
by pledges, { *Richard Fen.*

§ 2. *The declaration against the casual ejector; who gives notice thereupon to the tenant in possession. By original in K. B.*

Michaelmas Term, the 20th of king George the second.

Declaration.

Any day after
the plaintiff's
title accrued

Berks, } *WILLIAM Stiles*, late of *Newbury* in the said
to wit. } county, gentleman, was attached to answer
Richard Smith of a plea, wherefore with force and arms he entered
into one messuage, with the appurtenances, in *Sutton* in the said
county aforesaid, which *John Rogers, Esq.* demised to the said
Richard Smith for a term which is not expired, and ejected him
from his said farm, and other wrongs to him did, to the great
damage of the said *Richard*, and against the peace of the lord
the king, &c. And whereupon the said *Richard*, by *Robert*
Martin his attorney, complains, that whereas the said *John*
Rogers, on the first day of *October*, in the twenty-ninth year of
the reign of the lord the king that now is, at *Sutton* aforesaid, he
demised to the same *Richard* the tenement aforesaid, with the
appurtenances, to have and to hold the said tenement, with the
appurtenances, to the said *Richard* and his assigns, from the feast
of *Saint Michael the Archangel* then last past, to the end and term
of five years from then next following, and fully to be completed
and ended, by virtue of which demise the said *Richard* entered
into the said tenement, with the appurtenances, and was there
possessed; and the said *Richard* being so possessed thereof, the
said *William* afterwards, that is to say, on the said first day

* The proceedings in ejectment in the *common pleas*, and, by original, in the *king's bench*, are exactly alike; *mutatis mutandis*.

October, in the said 29th year, with force of arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said *John Rogers* demised to the said *Richard* in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said *Richard* out of the said farm, and other wrongs to him did, to the great damage of the said *Richard*, and against the peace of the said lord the king; whereby the said *Richard* saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings his suit, &c.

Mr. George Saunders,

Notice there-

I Am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next *Hilary Term* in his majesty's court of king's bench WHERESOEVER, &c. by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend

William Stiles.

§ 3. Declaration in ejectment by bill.

Middlesex, ff. } *A. B.* complains of *C. D.* being in the custody of the marshal of the *Marshalsea* of our sovereign lord the king, before the king himself, for that whereas *E. T.* gentleman, on the tenth day of *May*, in the fifth year of the reign of our lord the now king, at *Westminster*, in the county of *Middlesex*, had demised, granted, and to farm let, to the said *A.* five messuages, &c. (reciting the several parcels) with the appurtenances, situate, lying, and being in the parish of *St. Martin's in the Fields*, in the said county of *Middlesex*, to have and to hold the said tenements, with the appurtenances, to the said *A.* and his assigns, from the 25th day of *March* then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended; by virtue of which said demise, he the said *A.* entered into the said tenements, with the appurtenances, and was thereof possessed until the said *C.* afterwards, that is to say, on the same tenth day of *May*, in the sixth year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, which the said *E. T.* demised to the said *A.* in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *A.* out of his said farm; and then and there did other injuries to the said *A.* against the peace

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peace of our said lord the king, and to the damage of him the said A. of twenty pounds, and thereupon he brings his suit, &c.

Pledges to prosecute, { *John Doe,*
 { *Richard Roe.*

The notice to this declaration is the same as the last; only instead of the words "wheresoever, &c." must be substituted "at Westminster."

§ 4. Declaration in ejectment, by original, on a double demise.

Lancashire ss. { *THOMAS Williamson*, late of, &c. yeoman
 was attached to answer *William Thomas*
of a plea wherefore, with force of arms, he entered into one moiety of the manor of *Bretberton*, otherwise *Brothberton*, with the appurtenances, and into thirty messuages, ten cottages, four hundred acres of land, two hundred acres of meadow, and two hundred acres of pasture, with the appurtenances, in *Bretberton* otherwise *Brothberton*, in the county of *Lancaster* aforesaid, which *James* duke of *Arbol* demised to the said *William* for a term which is not yet expired; and also into one other moiety of the manor of *Bretberton*, otherwise *Brothberton*, with the appurtenances, and into thirty other messuages, ten other cottages, four hundred other acres of land, two hundred other acres of meadow, and two hundred other acres of pasture, with the appurtenances in *Bretberton*, otherwise *Brothberton* aforesaid, in the county of *Lancaster* aforesaid, which *George Bruce, Esq.* demised to the said *William* for a term which is not yet expired; and ejected the said *William* from his said several farms, and other wrongs to him did, to the great damage of the said *William*, and against the peace of our sovereign lord the king, &c. And thereupon the said *William*, by *John Howard* his attorney, complains, that whereas the said duke, on the day of , in the year of the reign of his present majesty, at *Prifon* in the county aforesaid, had demised to the said *William* the said moiety and tenements first above-mentioned, with the appurtenances; to have and to hold the same moiety and tenements, with the appurtenances, to the said *William* and his assigns, from the day of then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended: by virtue of which demise the said *William* entered into the same moiety and tenements, with the appurtenances, and was thereof possessed; and the said *William* being so possessed thereof, the said *Thomas* afterwards, to wit, on the said day of (the first day) in the said year, with force and arms, entered into the moiety and tenements first above-mentioned, with the appurtenances, which the said duke demised to the said *William* in manner aforesaid, for the term aforesaid, which is not yet expired; and ejected the said *William*

William out of the said first above-mentioned farm. And also that whereas the said *George Bruce, Esq.* on the day of , in the year aforesaid, at *Preston* aforesaid, had demised to the said *William* the said moiety and tenements secondly above mentioned, with the appurtenances; to have and to hold the same moiety and tenements, with the appurtenances, to the said *William* and his assigns, from the day of then last past, to the full end and term of five years from thence next ensuing, and fully to be compleat and ended; by virtue of which last-mentioned demise, the said *William* entered into the same moiety and tenements, with the appurtenances, and was thereof possessed: and the said *William* being so possessed thereof, the said *Thomas* afterwards, to wit, on the said day of (the first day in this count) in the said year, with force and arms, entered into the said moiety and tenements lastly above-mentioned, with the appurtenances, which the said *George Bruce, Esq.* demised to the said *William* in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *William* out of his said last-mentioned farm, and other wrongs to him did, to the great damage of the said *William*, and against the peace of our said sovereign lord the king, &c.: whereupon the said *William* says, he is injured, and has sustained damage to the value of forty pounds; and therefore he brings his suit, &c.

N.B. The declaration, by *bill*, on a double demise, is in substance the same as the count part of the declaration by *original*; and the only difference in *form* is that which exists between a declaration by *original* and a declaration by *bill*, on a single demise. The notice must be the same as that in page 472.

No. IV.

1. *Affidavit of service of declaration, where there is but one tenant.*

In the king's bench.

Between $\left\{ \begin{array}{l} A. B. \text{ on demise of } C. D. \text{ plaintiff,} \\ \text{and} \\ E. F. \text{ - - - defendant.} \end{array} \right.$

S. S. of, &c. maketh oath, and saith, that he this deponent did, on the day of last, deliver a true copy of the declaration and notice hereunto annexed, to *W. T.* tenant in possession of the premises in the said declaration mentioned; and, at the same time, told him it was a declaration in ejectment, and that unless he did appear thereunto, by some attorney

attorney of this honourable court, on the first day of this present Term, judgment would be entered against the said defendant by default, and he the said *W. T.* would be turned out of possession or words to that or the like effect.

Sworn, &c.

S. S.

§ 2. *Similar affidavit, where there are several tenants.*

S. S. of, &c. maketh oath and faith, that he this deponent did, on, &c. last, deliver a true copy of the declaration and notice hereunto annexed, to *W. T.* tenant in possession of part of the premises in the said declaration mentioned; and did also on the same day, deliver another copy of the said declaration and notice to *D.* the wife of *I. T.* tenant in possession of the residue of the premises in the said declaration mentioned. And this deponent further saith, that he told them severally that it was a declaration in ejectment, and that unless they did severally appear thereto, by some attorney of this honourable court, on the first day of this present Term, judgment would be entered against the said defendant by default, and they the said *W. T.* and *I. T.* would be severally turned out of possession; or words to that or the like effect.

Sworn, &c.

S. S.

§ 3. *Affidavit of service of declaration, where the tenant's wife refused to open the door.*

S. S. of, &c. maketh oath, and faith, that he this deponent on the _____ day of _____ last, went to the messuage *W. T.* situate at, &c. being the messuage in question in the cause; and that *M.* the wife of the said *W. T.* refused to open the door of the said messuage, but spoke through the wicket of the said door. And this deponent further saith, that he thereupon shew to the said *M.* a true copy of the declaration and notice hereunto annexed, and acquainted her with the contents thereof; but that as soon as he had so done, the said *M.* shut the said wicket, and refused to take the said declaration or notice. And this deponent further saith, that, not being able to deliver the same, he affixed the said declaration and notice on the door of the said messuage; and that the said *W. T.* on the same day acknowledged that he had received the same.

Sworn, &c.

S. S.

§ 4. *Affidavit of the tenant's refusing to defend an ejector, in order to have the landlord admitted defendant.*

S. S. of, &c. maketh oath, and faith, that he this deponent did, on, &c. last, by the direction of *A. B.* landlord of the premises in question in this cause, apply to *W. T.* the tenant in possession

possession

possession of the same premises, to know whether he the said *W. T.* would appear and become defendant in this cause, or would permit the said *A. B.* to defend his title to the said premises in the name of the said *W. T.*; and this deponent, at the same time, shewed and offered to deliver to the said *W. T.* a note, signed by the said *A. B.* whereby the said *A. B.* promised to defend and keep the said *W. T.* harmless, of, from, and against all costs and charges in this cause. And this deponent further saith, that the said *W. T.* told him, in answer, that he would not appear and become defendant in this cause, or any ways concern himself therein.

Sworn, &c.

S. S.

No. V.

§ 1. *The common rule of court.*

Hilary Term, the twenty-ninth year of king *George* the second. *Ante*, 243.

IT is ordered by the court, by the assent of both parties, and their attornies, that *George Saunders*, gentleman, may be made defendant in the place of the now defendant *William Stiles*, and shall immediately appear to the plaintiff's action, and shall receive a declaration in a plea of trespass and abatement of the tenements in question, and shall immediately plead thereto, not guilty: and, upon the trial of the issue, shall confess lease, entry, and ouster, and insist upon his title only. And if, upon trial of the issue, the said *George* do not confess lease, entry, and ouster, and by reason thereof the plaintiff cannot prosecute his writ, then the taxation of costs upon such non-appearing shall cease, and the said *George* shall pay such costs to the plaintiff, as by the court of our lord the king here shall be taxed and adjudged for such his default in non-performance of this rule; and judgment shall be entered against the said *William Stiles*, now the casual ejector, by default. And it is further ordered, that, if upon trial of the said issue a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ, upon any other cause than for the not confessing lease, entry, and ouster, as aforesaid, then the lessor of the plaintiff shall pay costs, and the plaintiff himself doth not pay them.

By the court.

When the proceedings are by *bill*, and not by *original*, the words "*and file common bail*" should be inserted after the words requiring the tenant's appearance; and the word *bill* should stand in the room of the word *writ*, throughout.

§ 2.

Ante, 415.

§. 2. *The rule as formerly drawn up in the king's bench.*

Michaelmas Term, in the sixth year of the reign of king George the second.

Bohun Inst.
Leg. 111.

Serjy. IT is ordered, by the consent of the attornies for both parties, that *C. D.* be admitted defendant instead of the now defendant *T. P.*; and that he forthwith appear at the suit of the plaintiff, and file common bail, and receive a declaration in a plea of trespass and ejectment for the tenements in question, and forthwith plead thereunto not guilty; and that upon the trial of the issue he confess lease, entry, and ouster, and insist upon the title only, otherwise let judgment be entered by the plaintiff against the now defendant *T.* by default; and upon the trial of the said issue the said *C. D.* shall not confess lease, entry, and ouster, by which the plaintiff shall not be able further to prosecute his bill against the said *C.* then no costs or charges shall be awarded upon such nonsuit, but the said *C.* shall pay to the plaintiff the costs and charges thereupon to be taxed. And it is further ordered, that, if upon the trial of the said issue a verdict shall be given for the said (defendant), or if it shall happen the plaintiff shall not further prosecute his said bill for any other cause, than for not confessing lease, entry, and actual ouster as aforesaid, that then the plaintiff's lessor shall pay to the said *C.* his costs and charges in that case to be adjudged, &c.

§. 3. *The rule as drawn up in the common pleas.*

Hilary Term, the fifth of king George the second.

Ante, 242.

Norfolk. IT is ordered, by the consent of *Robert Martin*, the plaintiff's attorney, and *John Cock*, attorney for *A. B.* who claims a title to the tenements in question, that the said *A. B.* be admitted defendant, and that the said defendant shall immediately appear by his said attorney, who shall receive a declaration, and plead thereto the general issue this Term; and that the said *A.* at the trial thereupon to be had, shall appear in his proper person, or by his counsel or attorney, and confess lease, entry, and ouster, of so much of the tenements specified in the plaintiff's declaration, as are in the possession of the said defendant, or his tenant, or of any person claiming by or under his title thereto, or that, in default thereof, judgment shall be entered against the said defendant, the casual ejector; but let all proceedings against him be stayed until default be made in some of the premises: and by the like consent it is further ordered, that if by reason of any such default the plaintiff shall be nonsuited upon the trial, the defendant shall take no advantage thereof, but shall pay costs to the plaintiff, to be taxed by the

prothonotary.

honorary. And it is further ordered, that the lessor of the
 plaintiff shall be chargeable with payment of costs to the said
 defendant, by this court in any manner to be allowed or ad-
 judged.

No. VI.

The record.

before the lord the king, at *Westminster*, of the Term of
Saint Hilary, in the twenty-ninth year of the reign of the lord
George the second, by the grace of God of *Great Britain*,
France, and *Ireland*, king, defender of the faith, &c.

GEORGE SAUNDERS, late of *Sutton*, in the county
 of *Wilt.* afore said, gentleman, was attached to answer
Richard Smith, of a plea, wherefore with force and arms he en-
 tered into one messuage, with the appurtenances, in *Sutton*,
 which *John Rogers*, esquire, hath demised to the said *Richard* for
 term which is not yet expired, and ejected him from his said
 messuage, and other wrongs to him did, to the great damage of the
 said *Richard*, and against the peace of the lord the king that now
 reigneth. And whereupon the said *Richard*, by *Robert Martin* his at-
 torney, complains, that whereas the said *John Rogers*, on the first Declaration
 of *October*, in the twenty-ninth year of the reign of the lord or count.
 king that now is, at *Sutton* afore said, had demised to the
 said *Richard* the tenement afore said, with the appurtenances,
 to have and to hold the said tenement, with the appurtenances,
 to the said *Richard* and his assigns, from the Feast of *Saint Michael*
Archangel then last past, to the end and term of five years
 thence next following, and fully to be complete and ended ;
 in virtue of which demise the said *Richard* entered into the said
 tenement, with the appurtenances, and was thereof possessed :
 the said *Richard* being so possessed thereof, the said *George*
Saunders, that is to say, on the first day of *October*, in the said
 twenty-ninth year, with force and arms, that is to say, with
 swords, staves, and knives, entered into the said tenement, with
 the appurtenances, which the said *John Rogers* demised to the
 said *Richard* in form afore said, for the term afore said, which is
 now yet expired, and ejected the said *Richard* out of his said
 messuage, and other wrongs to him did, to the great damage of the
 said *Richard*, and against the peace of the said lord the king ;
 whereby the said *Richard* saith that he is injured and endamaged
 to the value of twenty pounds : and thereupon he brings suit
 and good proof]. And the afore said *George Saunders*, by
John Newman his attorney, comes and defends the force and
 injury,

Defence.

Plea, not
guilty.
Issue.

Venire
awarded.

Respite, for
default of
jurors.

Nisi prius.

Postea.

*Tales de cir-
cumstantibus.*

Verdict for
plaintiff.

injury, when [and where it shall behove him]; and saith that he is in no wise guilty of the trespass and ejectment aforesaid as the said *Richard* above complains against him; and therefore he puts himself upon the country: and the said *Richard* do likewise the same: therefore let a jury come thereupon before the lord the king, on the octave of the *Purification of the Blessed Virgin Mary*, wheresoever he shall then be in *England*, who neither [are of kin to the said *Richard*, nor to the said *George*]; to recognize [whether the said *George* be guilty of the trespass and ejectment aforesaid]: because as well [the said *George*, as the said *Richard*, between whom the said difference is] have put themselves on the said jury]. The same day is then given to the parties aforesaid. Afterwards the process there being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the lord the king, until the day of *Easter* in fifteen days, wheresoever the said lord the king shall then be in *England*; unless the justice of the lord the king assigned to take assizes in the county aforesaid, shall have come before that time, to wit, on *Monday* the eighth day of *March*, at *Reading* in the said county, by the force of the statute [in that case provided], by reason of the default of the jurors [summoned to appear as aforesaid]. At which day before the lord the king, at *Westminster*, come the parties aforesaid by their attornies aforesaid; and the aforesaid justices assign affize, before whom [the jury aforesaid came], sent here the record before them had in these words, to wit, Afterwards the day and place within contained, before *Heneage Legge*, esquire, one of the barons of the *exchequer* of the lord the king; and *John Hardley Wilmet*, knight, one of the justices of the said lord the king, assigned to hold plea before the king himself, justice of the said lord the king, assigned to take assizes in the county of *Berks*, by the form of the statute [in that case provided], come as well the within-named *Richard Smith*, as the within-written *George Saunders*, by their attornies within contained; and the jurors of the jury whereof mention is within made being called certain of them, to wit, *Charles Holloway*, *John Hooks*, *Pe Grabam*, *Henry Cox*, *William Brown*, and *Francis Oakley*, come and are sworn upon that jury: and because the rest of the jurors of the same jury did not appear, therefore others of the bystanders being chosen by the sheriff, at the request of the said *Richard Smith*, and by the command of the justices aforesaid are appointed a-new, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed a-new, to wit, *Roger Bacon*, *Thomas Small*, *Charles Pye*, *Edward Hawtiss*, *Samuel Roberts*, and *Daniel Parker*, being likewise called, come and together with the other jurors aforesaid before impanelled and sworn being elected, tried, and sworn, to speak the truth in the matter within contained, upon their oath say, that the aforesaid *George Saunders* is guilty of the trespass and ejectment with

written

written, in manner and form as the aforesaid *Richard Smith* within complains against him; and assess the damages of the said *Richard Smith*, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence; and for those costs and charges, to forty shillings. Whereupon the said *Richard Smith*, by his attorney aforesaid, prayeth judgment against the said *George Saunders*, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid: and the said *George Saunders*, Motion in arrest of judgment.

by his attorney aforesaid, saith, that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him the said *George Saunders*, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried a-new by other jurors to be afresh impanelled. And, because the court of the lord the king here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said *Richard Smith* as to the said *George Saunders*, before the lord the king, until the morrow of the *Ascension of Our Lord*, wheresoever the said lord the king shall then be in *England*, to hear their judgment of and upon the premises, for that the court of the lord the king is not yet advised thereof. At which day, before the lord the king, at *Westminster*, come the parties aforesaid by their attorneys aforesaid: upon which the record and matters aforesaid having been seen, and by the court of the lord the king now here fully understood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court of the lord the king now here, that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid; therefore it is considered, Judgment for the plaintiff.

that the said *Richard* do recover against the said *George* his term yet to come, of and in the said tenements, with the appurtenances. and the said damages assessed by the said jury in form aforesaid, and also twenty-seven pounds six shillings and eight-pence for his costs and charges aforesaid, by the court of the lord the king here awarded to the said *Richard*, with his assent, by way of increase; which said damages in the whole amount to twenty-nine pounds seven shillings and eight-pence. And let the said *George* be taken [until he maketh fine to the lord the king]. And hereupon the said *Richard* by his attorney aforesaid prayeth a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid yet to come of and in the tenements aforesaid, with the appurtenances: and it is granted unto him, returnable before the lord the king on the morrow of the *Holy Trinity*, And return.

wheresoever he shall then be in *England*. At which day before the lord the king, at *Westminster*, cometh the said *Richard* by his attorney

Capiatur pro fine.

Writ of possession.

attorney aforesaid; and the sheriff, that is to say, *Sir Thomas Reeve*, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the ninth day of *June* last past, did cause the said *Richard* to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances as he was commanded.

No. VII.

SPECIAL VERDICTS.

§ 1. *York v. Jordan.*

Not guilty.

Award of
venire.

Postea.

AND the said *John Jordan*, *John Mittel*, and *Thomas*, by *J. W.* their attorney, come and defend the force and injury, when, &c. and say, that they are in no wise guilty of the trespass and ejectment aforesaid, as the said *James* above complains against them; and thereof they put themselves upon the country, and the said *James* does likewise the same. Therefore the sheriff is commanded, that he cause to come hither, on the octave of the *Purification of the Blessed Virgin Mary*, twelve &c. By whom, &c. And who neither, &c. To recognize &c. Because as well, &c. At which day the jury between the said parties, in the said action, were respited between them until this day (namely) in fifteen days from the Feast day of *Easter* then next ensuing, unless his majesty's justices assigned by virtue of the statute, &c. to hold the assizes in the county aforesaid, had come before, on *Monday* the twenty-first day of *March* then next ensuing, at *Maidstone* in the county aforesaid; and now here at this day, as well the said *James* as the said *John Jordan*, *John Mittel*, and *Thomas*, by their said attorneys, appeared; and the said justices of assize before whom, &c. returned hither their record in these words: Afterwards, at the day and place within contained, as well the within-written *James York* as the within-written *John Jordan*, *John Mittel*, and *Thomas*, by their attorneys within contained, came before *Sir John Holt*, knight, his majesty's Chief Justice assigned to hold pleas before the king himself (*Eldred Lancelot Lee* being associated for this turn to the said *Sir John Holt*) and *Sir Edward Nevill*, knight, one of the justices of his said majesty's bench, and *Sir Nicholas Lechmere*, knight, one of his majesty's barons of the exchequer, his majesty's justices appointed to hold the assizes in the county of *Kent*, by virtue of the statute, &c. (the presence of the said *Edward Nevill* and *Nicholas Lechmere* not being expected, by virtue of his majesty's writ of *fi non venire*, &c.) and the jurors of the jury whereof

mentioned

mention is within made, being summoned, likewise appeared;
 who being chosen, tried, and sworn to declare the truth of the
 within contents, declare, upon their oath, that, long before the
 within-written time when the within-mentioned trespass and
 judgment is within supposed to have been committed, one *John Strong-*
Stronghill, esq. was seised of the tenements with the appurte-
 nances mentioned in the declaration within-written (amongst
 other things) in his demesne as of fee, having issue *Henry* his son
 and heir apparent, mentioned in his last will; and being so
 thereof seised, on the 17th day of *June*, in the year of Our Lord
 1665, made his last will and testament in writing, and thereby
 gave and devised, amongst other things, in the words following,
 to wit [here was set forth the will, *in hæc verba*; containing a
 devise to his son *Henry Stronghill* for life; remainder to the issue
 male of his said son, in tail; as it doth, by the said last will
 produced in evidence to the jury aforesaid, more plainly appear:
 and the jurors aforesaid do upon their said oath farther declare,
 that the said *John Stronghill* afterwards (that is to say) on the
 first day of *September*, in the year of Our Lord 1665, died seised
 of such his estate of and in the tenements aforesaid, with the ap-
 purtenances (whereof the tenements aforesaid, mentioned in the
 said declaration, are parcel): after whose decease he the said
Henry Stronghill entered into the said tenements with the appur-
 tenances (whereof the said tenements, with the appurtenances,
 mentioned in the said declaration, are parcel), and was seised
 thereof as the law requires. And the said jurors do upon their
 said oath farther declare, that he the said *Henry Stronghill*, being
 seised as aforesaid, afterwards and before he had any issue of his
 body lawfully begotten, to wit, on the 23d day of *October*, in
 the year of Our Lord 1676, by an indenture executed between
 the said *Henry Stronghill*, of the one part, and *Thomas Short* and
William Norris, of *London*, gentlemen, of the other part, bearing
 date the same day and year, in consideration of five shillings
 mentioned in the indenture aforesaid, to be paid by the said
Thomas Short and *William Norris* to him the said *Henry Stronghill*,
 the said *Henry Stronghill* demised to the said *Thomas Short* and
William Norris the tenements aforesaid, mentioned in the said
 declaration; to have and to hold to the said *Thomas Short* and
William Norris, from the day next before the day of the date of
 the indenture aforesaid, for one whole year from thence next
 ensuing; as it doth by the said indenture produced in evi-
 dence to the said jurors more fully appear: by virtue whereof
 the said *Thomas Short* and *William Norris* entered into the tenements
 aforesaid, with the appurtenances, and were thereof pos-
 sessed for the term aforesaid; and being so possessed thereof, af-
 terwards, to wit, on the twenty-fourth day of the same month
 of *October*, in the year last above mentioned, by an indenture
 quadripartite made between him the said *Henry Stronghill*, of the
 first part, the said *Thomas Short* and *William Norris*, of the second
 part, *William Lowe*, of, &c. gentleman, of the third part, and
Judith

Special ver-
dict.

John Strong-
hill, seised in
fee;

made his will,

and died
seised.

The estate
descended to
Henry; who
entered and
was seised,
and demised
for a year;

and after-
wards re-
leased to *Short*
and *Norris*,

Judith Strongbill, of, &c. of the fourth part, bearing date the same day and year, he the said *Henry Strongbill* granted, demised, released, quit-claimed, and confirmed, to the said *Thomas Short* and *William Norris*, and their heirs, the tenements aforesaid with the appurtenances, mentioned in the declaration aforesaid then being in their actual possession; to have and to hold to the said *Thomas Short* and *William Norris*, and their assigns, to the use of the said *Judith Strongbill*, and her assigns, for and during the term of her natural life; and after the decease of the said *Judith*, to the use of the said *Henry Strongbill*, his heirs and assigns for ever. And the said jurors do, upon their said oath, further declare, that this following clause is contained in the said last-mentioned indenture, that is to say [here was inserted, to length, a covenant to suffer a recovery to the uses of the lease and release]; as it doth by the said indenture, produced in evidence to the said jurors, more fully appear: by virtue of which indentures of lease and release last mentioned, the said *Judith* entered into the said tenements, with the appurtenances, mentioned in the said declaration, and was thereof possessed as the law requires. And the said jurors do upon their said oath further declare, that, in pursuance of the said last-mentioned indenture, he, the said *William Lowe*, gentleman, on the twenty-third day of the same month of *October*, sued out of the court of chancery of his late majesty *Charles* the second, late king of England &c. against them the said *Thomas Short* and *William Norris*, by the said majesty's writ of entry *sur disseisin in le post*, returnable before his said majesty's justices of the court of common pleas at *Westminster*, in the county of *Middlesex*, on the morrow of *St. Martin* then next following; by which said writ he the said *William Lowe* demanded against the said *Thomas Short* and *William Norris* (amongst other things) the tenements aforesaid, with the appurtenances, mentioned in the declaration aforesaid, by the names of, &c. as his right and inheritance, and wherein they the said *Thomas Short* and *William Norris* had no entry, unless after a disseisin, which *Hugh Hunt* unjustly and without any judgment made thereon, to the said *William Lowe*, within thirty years, &c. and whereupon he declared that he was seised of the said tenements, with the appurtenances, in his demesne, as of fee and right, in time of peace, in the reign of our late sovereign late the king, by taking the profits to the value, &c. and into which &c. and thereupon he brought his suit, &c. And the said *Thomas* and *William Norris* personally came and defended their right, when, &c. and called thereto to warranty the said *Henry Strongbill*, who was then personally present in court, and free warranted to them the tenements aforesaid, with the appurtenances; and thereupon the said *William Lowe* demanded against the said *Henry Strongbill*, tenant by his warranty, the tenements aforesaid, with the appurtenances, in the manner aforesaid; and whereupon he declared he was seised of the tenements aforesaid with the appurtenances, in his demesne, as of fee and right

to the use of
Judith Strong-
bill for life.

Remainder to
his own right
heirs.

Covenant to
suffer a reco-
very.

Recovery ac-
cordingly.

Voucher of
Henry Strong-
bill;

time of peace, in the reign of our late lord the king, by taking
 the profits to the value, &c. and into which, &c. and thereupon
 he brought his suit, &c. And the said *Henry*, tenant by his war-
 ranty, defended his right, when, &c. and farther vouched *John*
Wheeler to warranty thereupon, who was likewise personally pre-
 sent in court, and freely warranted to him the tenements, with
 the appurtenances, &c. and thereupon the said *William Lowe* de-
 manded against the said *John Wheeler*, tenant by his warranty,
 the tenements aforesaid, with the appurtenances, in the manner
 aforesaid; and thereupon he declared, that he himself was seised
 of the said tenements, with the appurtenances, in his demesne,
 of fee and right, in time of peace, in the reign of our late
 lord the king, by taking the profits thereof to the value, &c.
 and into which, &c. and thereupon he brought his suit, &c.
 and the said *John Wheeler*, tenant by his warranty, defended
 his right, when, &c. and pleaded, that the said *Hugh* had not
 seised the said *William Lowe* of the tenements aforesaid, with
 the appurtenances, as he the said *William* had before supposed by
 the writ and declaration aforesaid; and therefore he put himself
 in the country, &c. and the said *William Lowe* craved leave to
 depart thereto, and it was granted to him, &c. And afterwards
 the said *William Lowe* came back again into the court, that same
 term, in his own person, and the said *John Wheeler*, although
 solemnly called, came not back, but departed in despite of the
 court, and made default; therefore it was adjudged, that the Judgment
 of *William Lowe* recover his seisin, against the said *Thomas* and upon the
 recovery.
 of *William Norris*, of the tenements aforesaid, with the appurte-
 nances: and that the said *Thomas* and *William Norris* should have
 the land of the said *Henry* to the value, &c. and that the said
Henry should have of the land of the said *John Wheeler* to the va-
 lue, &c. and that the said *John Wheeler* should be amerced, &c.
 and thereupon the said *William Lowe* prayed a writ of our said Award of the
 sovereign lord the king, to be directed to the sheriff of the county writ of seisin.
 aforesaid, to cause him to have full seisin of the tenements aforesaid,
 with the appurtenances; and it was granted to him, re-
 ceivable forthwith, &c. Afterwards, to wit, on the twenty-
 third day of *November*, that same Term, the said *William Lowe*
 personally into court, and the sheriff, to wit, *Sir John Cutler*,
 knight and baronet, then returned, that he, by virtue of the writ Return,
 him directed, on the twenty-third day of *November* then last
 past, caused the said *William Lowe* to have full seisin of the tene-
 ments aforesaid, with the appurtenances, as by the writ he was
 commanded to do. And the said jurors do farther upon their
 oath declare, that afterwards, to wit, on the first day of *May*,
 the year of Our Lord one thousand six hundred and seventy-
 eight, and not before, the said *Henry Strongbill* had issue of his
 lawfully begotten, to wit, the within-named *Richard Strong-*
 bill, the lessor of the plaintiff, his first-born and only son. And
 the said jurors do upon their said oath farther declare, that the said *Justitib* died
 afterwards, to wit, on the first day of *May*, in the seised.
 year

Henry entered,
and bargained,
and sold;

and afterwards
released
to Simpson.

Entry and
death of
Simpson.

Descent to his
son;

who entered,

year of Our Lord one thousand six hundred and seventy nine, died seised as aforesaid: after whose death the said Henry entered into the said tenements, with the appurtenances, whereof, &c. and was seised thereof, as the law requires: and afterwards, to wit, on the tenth day of *August*, in the year of Our Lord one thousand six hundred and eighty-one, he the said Henry, being seised as aforesaid, by an indenture executed between the said Henry Strongbill, of the one part, and Sir John Simpson, of the Inn Temple, London, knight, of the other part, for and in consideration of five shillings of lawful money of England, mentioned in the said indenture to have been paid by the said John Simpson to the said Henry Strongbill, he the said Henry Strongbill demised, bargained, and sold to the said John Simpson, the tenements aforesaid, with the appurtenances, mentioned in the declaration aforesaid; to have and to hold to the said John Simpson, from the Feast of Saint John Baptist then last past before the date of the said indenture, for the term of six months then next following as by the said indenture, produced to the jury in evidence, do more fully appear: by virtue whereof he the said John Simpson entered into the said tenements, with the appurtenances, mentioned in the said declaration, and was thereof possessed for the term aforesaid; and being so possessed thereof, afterwards, to wit, on the eleventh day of the same month of *August*, in the year last above mentioned, by an indenture executed between the said Henry Strongbill, of the one part, and the said John Simpson, of the other part, bearing date the same day and year, in consideration of the sum of nine hundred pounds of lawful money of England, paid by the said John Simpson to the said Henry Strongbill, he the said Henry Strongbill granted, bargained, sold, released and confirmed to the said John Simpson and his heirs (he the said John Simpson being in actual possession thereof), the tenements aforesaid, with the appurtenances, mentioned in the said declaration; to have and to hold to the said John Simpson, his heirs and assigns, to the sole use and behoof of the said John Simpson, his heirs and assigns for ever. And the said jurors do upon their said oath farther declare, that in the said last-mentioned indenture it is thus contained in the following clause, that is to say [here was inserted, length, a covenant to suffer a recovery, to the use of Simpson, his heirs and assigns for ever; and then was stated as before, *mutatis mutandis*, a recovery suffered accordingly]: by virtue whereof he the said John Simpson entered into the tenements aforesaid, whereof the tenements aforesaid, mentioned in the said declaration, are parcel; and was seised thereof, as the law requires; and being so seised thereof, afterwards, to wit, on the first day of *May*, in the year of Our Lord one thousand six hundred and eighty-three, he died: after whose decease the tenements aforesaid, with the appurtenances, whereof, &c. descended to Thomas Simpson, only son and heir of the said John Simpson: who entered, by virtue whereof he the said Thomas Simpson the son entered into the said tenements, with the appurtenances, and was seised thereof.

thereof, as the law requires: and afterwards, to wit, on the sixteenth day of *November*, in the year of Our Lord one thousand six hundred and eighty-three, he the said *Thomas Simpson*, being seized as aforesaid, did, by an indenture tripartite, executed between the said *Henry Strongbill* and *Thomas Simpson*, of the first part, *Henry Oxenden*, esquire, by the name of, &c. of the second part, and *George Oxenden*, of, &c. and *Richard Oxenden*, &c. of the third part, bearing date the same day and year, in consideration of the sum of five shillings of lawful money of *England*, mentioned in the said indenture to have been paid to the said *Henry Strongbill* and *Thomas Simpson*, they the said *Henry Strongbill* and *Thomas Simpson* bargained and sold to the said *George Oxenden* and *Richard Oxenden* the tenements aforesaid, with the appurtenances, mentioned in the said declaration (amongst other things), to have and to hold to the said *George* and *Richard*, from the day next before the day of the date of the said indenture, for the term of one whole year next ensuing, with an intent that the said *George* and *Richard* should, by virtue of the said indenture, and by force of the statute for transferring uses into possession, be in actual possession of the premises aforesaid, whereof, &c. and be thereby enabled to accept a grant and release of the reversion and inheritance therein, to the said *George* and *Richard*, and their heirs, to the uses, intents, and purposes, to be limited, expressed, and declared; as by the said indenture, produced in evidence to the said jurors, it doth and may more fully appear: by virtue whereof the said *George Oxenden* and *Richard Oxenden* entered into the tenements aforesaid, mentioned in the said declaration, and were thereof possessed for the term aforesaid; and being so possessed thereof, afterwards, to wit, on the seventeenth day of *November*, in the year last above mentioned, by an indenture tripartite, executed between them the said *Henry Strongbill* and *Thomas Simpson*, of the first party the said *Richard Oxenden*, of the second part, and the said *Henry Oxenden* and *George Oxenden*, of the third part, bearing date the same day and year, in consideration of the sum of 99*l.* 5*s.* of lawful money of *England*, paid by the said *Henry Oxenden* to the said *Thomas Simpson*, and of the sum of 84*l.* 15*s.* of like lawful money of *England*, paid by the said *Henry Oxenden* to the said *Henry Strongbill*, he the said *Henry Strongbill* sold, aliened, released, and confirmed to the said *George Oxenden* and *Richard Oxenden* (amongst other things), the said tenements, with the appurtenances, mentioned in the declaration aforesaid (then being in their actual possession), to have and to hold to the said *George Oxenden* and *Richard Oxenden*, their heirs and assigns for ever. And the said jurors do upon their said oath further declare, that this following clause is contained in the said indenture last mentioned [here was set forth a covenant for further assurance, *in hac verba*]; as by the said indenture, produced in evidence to the said jurors, it doth and may appear: by virtue whereof they the said *George* and *Richard Oxenden* entered into the said tenements, with the appurtenances, mentioned

and by an indenture of bargain and sale granted to *Henry Oxenden*, &c.

Release thereupon.

Entry of *George* and *Richard Oxenden*.

And a fine
levied to them
by Strongbill
and his wife.

Henry Strong-
bill died,

Richard, his
eldest son,
being then
under age.

George and
Richard Ox-
enden leased
to John Jordan
and others at
will;

who entered :
and the plain-
tiff lessor en-
tered upon
them,

in the said declaration, whereof, &c. and were seised thereof, as the law requires; and being so seised thereof, afterwards, that is to say, in *Michaelmas Term*, in the year last above mentioned, a fine was levied in the court of our late sovereign lord king *Charles the second*, before *Thomas Jones*, *Hugh Wyndham*, *John Charlton*, and *Creswell Levinz*, his said late majesty's Justices of the court of common pleas, between the said *Henry Oxenden*, plaintiff, and the said *Henry Strongbill*, and the said *Frances* his wife, desorciants, of the tenements aforesaid, with the appurtenances, mentioned in the said declaration, by the name of, &c. By which said fine they the said *Henry Strongbill* and *Frances* acknowledged the tenements aforesaid, with the appurtenances, whereof, &c. (amongst other things), to be the right of *Henry Oxenden*, as those which he the said *Henry Oxenden* had by the gift of the said *Henry Strongbill* and *Frances*, and those they remised and quit-claimed from them the said *Henry Strongbill* and *Frances*, and their heirs, to the said *Henry Oxenden* and his heirs for ever; and further, they the said *Henry Strongbill* and *Frances* granted, for themselves and the heirs of the said *Henry Strongbill*, that they would warrant to the said *Henry Oxenden*, and his heirs, the tenements aforesaid, with the appurtenances, whereof, &c. against the said *Henry Strongbill* and *Frances*, and the heirs of the said *Henry Strongbill*, for ever. And the said jurors do upon their said oath farther declare, that the said fine, levied as aforesaid, was levied to the use of the said *George Oxenden* and *Richard Oxenden*, their heirs and assigns; whereby the said *George Oxenden* and *Richard Oxenden* were seised of the tenements aforesaid, with the appurtenances, whereof the tenements mentioned in the said declaration are parcel, as the law requires; and afterwards, to wit, in the year of Our Lord one thousand six hundred and ninety-five, the said *Henry Strongbill* died, and left issue of his body *Richard Strongbill*, the lessor of the plaintiff, his first-born son and heir (the said *Richard* then being within the age of twenty-one years); and the said *Richard Oxenden* and *George Oxenden* being so seised thereof, they the said *George* and *Richard* afterwards, to wit, on the first day of *April*, in the ninth year of the reign of his present majesty, demised the tenements aforesaid, with the appurtenances, whereof the tenements mentioned in the said declaration are parcel, to the said *John Jordan*, *John Mittel*, and *Thomas Hammond*; to have and to hold to the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, from the Feast of the *Annunciation of the Blessed Virgin Mary* then last past, for one whole year, and so from year to year, as long as both parties should please: by virtue of which lease they the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, entered into the said demised premises, with the appurtenances, and were possessed thereof; and being so possessed thereof, he the said *Richard Strongbill*, lessor of the said *James York*, afterwards, to wit, on the seventh day of *October*, in the ninth year of the reign of his present majesty, entered into the said tenements, with the appurtenances,

appurtenances, whereof the said tenements mentioned in the said
 declaration are parcel, and from thence drove out and removed
 the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, and
 was seised thereof, as the law requires; and being so seised
 thereof, he the said *Richard Strongbill*, on the seventh day of *Octo-*
ber, in the ninth year of the reign of his present majesty, de-
 mised to the said *James York* the tenements aforesaid, with the
 appurtenances; to hold to the said *James York*, and his assigns,
 from the twenty-ninth day of *September* then last past, to the full end
 and term of five years from thence next ensuing and fully to be
 complete and ended: by virtue of which said demise, he the said
James York entered into the said tenements, with the appurte-
 nances, and was thereof possessed, until the said *John Jordan*,
John Mittel, and *Thomas Hammond*, afterwards, to wit, on the
 said seventh day of *October*, in the ninth year aforesaid, men-
 tioned in the declaration aforesaid, entered into the tenements
 aforesaid, with the appurtenances, which the said *Richard Strong-*
bill had demised to the said *James*, in the manner aforesaid, for
 the said term, which is yet unexpired, in and upon the possession
 of the said *James*, and ejected, drove out, and removed him the
 said *James* from his farm aforesaid, for the term aforesaid, and
 him the said *James*, so ejected, driven out, and removed, hath
 withheld, and still doth withhold, from his said possession thereof,
 as the said *James* doth within thereof complain against him.
 But whether upon the whole matter aforesaid, found by the said
 jurors in the manner aforesaid, it shall appear to his majesty's
 justices of this court, that they the said *John Jordan*, *John Mit-*
tel, and *Thomas Hammond*, are guilty of the trespass and ejectment
 within written, in the tenements aforesaid, with the appur-
 tenances, mentioned in the said declaration, the said jurors are
 altogether ignorant, and therefore pray the advice of this court;
 and if upon the whole matter aforesaid, found by the said jurors
 in the manner aforesaid, it shall appear to his said majesty's
 justices of this court, that they the said *John Jordan*, *John*
Mittel, and *Thomas Hammond*, are in construction of law guilty
 of the trespass and ejectment aforesaid, in the said tenements,
 with the appurtenances, within mentioned in the said declara-
 tion, then the said jurors declare, upon their said oath, that they
 the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, are
 guilty thereof, in such manner and form as the said *James York*
 doth within thereof complain against them; and they assess the
 damages of the said *James* on that occasion, besides his expences
 and costs laid out by him about his suit in this cause, to twelve
 pence, and for his expences and costs to twenty shillings: but
 if upon the whole matter aforesaid, found by the said jurors in
 the manner aforesaid, it shall appear to his said majesty's justices
 of this court, that they the said *John Jordan*, *John Mittel*, and
Thomas Hammond, are in construction of law not guilty of the
 trespass and ejectment aforesaid, in the tenements aforesaid, with
 the appurtenances, above mentioned in the said declaration,

and ejected
 them, and be-
 came seised,
 and demised
 to the plain-
 tiff;

who entered
 upon the de-
 fendants.

But whether
 the defend-
 ants are
 guilty, the
 jury leave to
 the Judges,
 and if they
 determine
 that they are
 guilty, then
 the jury find
 them so.

if not, then
 they find
 them not
 guilty.

Conting-
encies.

then the said jurors declare, upon their said oath, that they the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, are not guilty thereof, in such manner and form as the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, have within alledged in their plea. And because the said Justices of this court are not yet advised what judgment to give of and concerning the premises, a day therefore is given to the said parties, before *Sir George Treby*, Knight, and his brethren, his said majesty's Justices of his said court of common pleas, in fifteen days from *Easter-day*, to hear their judgment thereupon, the proceedings to be in the same state as they now are: at which day as well the said *James*, as the said *John Jordan*, *John Mittel*, and *Thomas Hammond*, came hither by their attornies aforesaid; and because the said Justices of this court are willing further to advise themselves of and concerning the premises, before they give judgment thereupon, a day is here given to the said parties till the morrow of the *Holy Trinity*, to hear their judgment thereupon for that the said Justices are not yet determined, &c.

§ 2. *Humphry v. Bathurst.*

3. Lut. 741.

Not guilty.

Award of the
verdict.

Award of
juri prius.

Poslea.

AND the said *Edward*, by *Edmund Hodfall* his attorney, comes and defends the force and injury, when, &c. and says that he is in no wise guilty of the trespass and ejectment aforesaid, as the said *John* above complains against him; and therefore he puts himself upon the country, and the said *John* does likewise the same: therefore the sheriff is commanded that he cause to come hither, on the octave of the *Purification of the Blessed Virgin Mary*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. At which day the jury between the said parties, in the said action, were respited here until the day, namely, in fifteen days from the Feast of *Easter* then next following, unless his present majesty's justices assigned to hold the assizes in the county aforesaid, by virtue of the statute, &c. should come before, on *Tuesday* the eighteenth day of *March* next ensuing, at *Rocheſter* in the county aforesaid. And now here at this day, the said *John* came by his said attorney, and the said Justices of assizes before whom, &c. returned hither their record in these words: Afterwards, at the day and place within contained, as well the within-named *John Humphry*, as the within-written *Edward Bathurst*, by their attornies within-mentioned came before *Sir Thomas Jones*, knight, his majesty's Chief Justice of the court of common pleas, and *Sir Job Charlton*, knight, one of his said majesty's Justices of the common pleas, assigned by virtue of the statute, &c. to hold the assizes in the county of *Kent*, and the jurors of the jury whereof mention is within made, being summoned, some of them, namely, *E. S.* &c. appear, and are sworn upon the jury: and because the rest of the jurors of the jury

have not appeared, therefore others of the by-standers, *Tales de cir-*
 chosen by the sheriff of the county aforesaid for this purpose, *cumstantibus.*
 at the request of the said John Humphry, and by the command
 of the said justices, put on anew, whose names are assised in the
 within-written panel, according to the direction of the statute
 in such case made and provided; and the jurors so put on anew,
 namely, J. B. &c. being called, likewise appear, who, being
 sworn, tried, and sworn, together with the jurors before im-
 panelled and sworn, to declare the truth of the within-contents,
 to the within-written trespass and ejectment in two parts of
 the manor of *Pullens*, with the appurtenances within-mentioned, As to two
 the whole in three parts to be divided), and also in two parts of parts of the
 all and singular the tenements within-written, with the appurte- manor, and as
 nances (the whole in three parts likewise to be divided), declare to two third
 upon their oath, that the said E. B. is in no wise guilty thereof, parts of the
 the said E. B. hath within alledged in his plea: and as to the premises, not
 within-written trespass and ejectment, in the third part of the guilty.
 manor aforesaid, with the appurtenances, residue of the said As to the
 manor, and also in the third part of all and singular the tene- other third
 ments aforesaid, with the appurtenances, residue of the said part, a special
 nements, with the appurtenances (the whole in three parts to verdict.
 divided), as aforesaid, the said jurors do farther declare, upon
 their said oath, that long before the within-written time when
 the trespass and ejectment within-mentioned are within-supposed
 to have been committed, namely, on the first day of *December*,
 the thirty-eighth year of the reign of our late sovereign lady
Elizabeth, late queen of England, one *Paul Bathurst* was seised in P. Bathurst
 of and in the manor aforesaid, with the appurtenances, and seised in fee,
 of and in all and singular the tenements aforesaid, with the
 appurtenances, specified in the within-written declaration, in his
 mesne as of a fee. And the said jurors farther declare, upon had issue Ed-
 their said oath, that the said *Paul Bathurst* had issue of his body ward, his son
 lawfully begotten, *Edward Bathurst*, his son and heir apparent, and heir ap-
 and that the said *Paul Bathurst* afterwards, and before the said parent.
 time when, &c. namely, on the seventh day of *December*, in the Indenture be-
 twentieth year of the reign of our said late sovereign lady tween P. B.
Elizabeth, late queen of England, &c. made and as his deed deli- of the one
 vered a certain indenture, sealed with his seal, executed between part, and the
 the said *Paul Bathurst* by the name of, &c. of the one part, and said *Edward*
 the said *Edmund Bathurst* his son, one *John Horsmonden*, *George* and others of
 and *Robert Austen*, by the names of, &c. of the other part, the other part.
 bearing date on the said seventh day of *December*, in the said
 twentieth year of the reign of our said late sovereign lady *Eliz-*
abeth, late queen of England, &c. the tenor of which indenture
 sheweth in these words (set forth in the indenture *in hæc verba*);
 it doth and may by the indenture aforesaid, now shewn to
 the said justices, and prayed, read, and given in evidence to the
 jury (among other things), more fully appear. And the said Death of Paul
 jurors farther declare upon their oath, that the said *Paul Bathurst* Bathurst,
 afterwards, and before the said time when, &c. namely, on the
 eighth

eighth day of *December*, in the forty-second year of the reign of the said late sovereign lady queen *Elizabeth*. died at *Gowdburgh* aforesaid, in the said county of *Kent*; and that the said *Edward Bathurst*, son and heir of the said *Paul Bathurst*, afterwards and before the said time when, &c. namely, on the tenth day of the aforesaid month of *December*, in the forty-second year aforesaid, entered into the manor and tenements aforesaid, with the appurtenances, and was seised thereof, as the law requires; and that the said *Edward Bathurst*, son and heir of the said *Paul Bathurst*, had issue of his body lawfully begotten, four sons, viz. *Thomas* his eldest son, *Edward* his second son, father to the said *Edward William* his third son, and *Richard* his fourth son; and that the said *Edward* the father, being so seised, afterwards and before the said time when, &c. namely, on the first day of *May*, in the year of Our Lord 1630, died at *Gowdburgh* aforesaid, in the said county of *Kent*; and that *Thomas Bathurst*, the eldest son of the said *Edward*, survived him; and that he afterwards, and before the said time when, &c. namely, on the second day of *May*, the year of Our Lord 1663, entered into the said manor and tenements, with the appurtenances, and was seised thereof, as the law requires. And the said jurors do farther declare, upon the said oath, that afterwards, and before the said time when, &c. to wit, in *Michaelmas* Term, in the seventh year of the reign of his late majesty king *Charles* the first, before *Sir Robert Heath* knight, and his brethren, then Justices of the court of common pleas of his said late majesty king *Charles* the first, at *Westminster*, one *George Maplesden*, gentleman, and *James Sarys*, gentleman, personally demanded against the said *Thomas Bathurst*, by the name of *Thomas Bathurst*, gentleman, the manor of *Pullens*, with the appurtenances, and one messuage, &c. as his right and inheritance, and into which the said *Thomas* had not any entry but after a disseisin, which *Hugh Hunt* unjustly and without judgment made thereon, to the said *George* and *James*, within thirty years, &c. and whereupon they declared that they were seised of the manor, tenements, and rents aforesaid, with the appurtenances in their demesne of a fee and right, in time of peace, in the time of our late sovereign lord the king that then was, by taking the profits thereof, &c. and in which, &c. and thereof they brought their suit, &c. And the said *Thomas* personally came and defended his right, when, &c. and thereupon vouched to warranty *Edward Howse*, who being then personally present in court, gratis warranted to him the manor, tenements, and rents aforesaid, with the appurtenances; and thereupon the said *George* and *James* demanded against the said *Edward*, tenant to his warranty, the manor, tenements, and rents aforesaid, with the appurtenances: and whereupon they declared that they were seised of the manor, tenements, and rents aforesaid, with the appurtenances, in their demesne as of fee and right, in time of peace, in the time of our said late sovereign lord the king that then was, by taking the profits thereof, &c. and

Entry of *Edward* his son, aforesaid month of *December*, in the forty-second year aforesaid, entered into the manor and tenements aforesaid, with the appurtenances, and was seised thereof, as the law requires; and that the said *Edward Bathurst*, son and heir of the said *Paul Bathurst*, had issue of his body lawfully begotten, four sons, viz. *Thomas* his eldest son, *Edward* his second son, father to the said *Edward William* his third son, and *Richard* his fourth son; and that the said *Edward* the father, being so seised, afterwards and before the said time when, &c. namely, on the first day of *May*, in the year of Our Lord 1630, died at *Gowdburgh* aforesaid, in the said county of *Kent*; and that *Thomas Bathurst*, the eldest son of the said *Edward*, survived him; and that he afterwards, and before the said time when, &c. namely, on the second day of *May*, the year of Our Lord 1663, entered into the said manor and tenements, with the appurtenances, and was seised thereof, as the law requires. And the said jurors do farther declare, upon the said oath, that afterwards, and before the said time when, &c. to wit, in *Michaelmas* Term, in the seventh year of the reign of his late majesty king *Charles* the first, before *Sir Robert Heath* knight, and his brethren, then Justices of the court of common pleas of his said late majesty king *Charles* the first, at *Westminster*, one *George Maplesden*, gentleman, and *James Sarys*, gentleman, personally demanded against the said *Thomas Bathurst*, by the name of *Thomas Bathurst*, gentleman, the manor of *Pullens*, with the appurtenances, and one messuage, &c. as his right and inheritance, and into which the said *Thomas* had not any entry but after a disseisin, which *Hugh Hunt* unjustly and without judgment made thereon, to the said *George* and *James*, within thirty years, &c. and whereupon they declared that they were seised of the manor, tenements, and rents aforesaid, with the appurtenances in their demesne of a fee and right, in time of peace, in the time of our late sovereign lord the king that then was, by taking the profits thereof, &c. and in which, &c. and thereof they brought their suit, &c. And the said *Thomas* personally came and defended his right, when, &c. and thereupon vouched to warranty *Edward Howse*, who being then personally present in court, gratis warranted to him the manor, tenements, and rents aforesaid, with the appurtenances; and thereupon the said *George* and *James* demanded against the said *Edward*, tenant to his warranty, the manor, tenements, and rents aforesaid, with the appurtenances: and whereupon they declared that they were seised of the manor, tenements, and rents aforesaid, with the appurtenances, in their demesne as of fee and right, in time of peace, in the time of our said late sovereign lord the king that then was, by taking the profits thereof, &c. and

who had issue *Thomas* his eldest son, and *Edward*, *William*, and *Robert*. That *Edward* the father died seised. Entry of *Thomas* his eldest son;

who suffered a recovery;

wherein *Edward Howse* was vouched.

And thereupon they brought their suit, &c. and
 said Edward, tenant by his warranty, defended his right
 &c. and pleaded that the said Hugh had not disseised the
 George and James of the manor, tenements, and rents afore-
 said, with the appurtenances, as they the said George and James
 by their said writ and declaration supposed; and thereof
 they put themselves on the country, and the said George and
 James did likewise the same; and the said George and James
 they leave thereto to imparl, and it was granted to them, &c.
 afterwards, in that same Term, they the said George and
 James personally came again there into court at Westminster, and
 said Edward, although solemnly called, came not again, but
 was in contempt of the court, and made default; therefore
 was adjudged that the said George and James should recover
 the full seisin, against the said Thomas, of the manor, tenements,
 and rents afore said, with the appurtenances, and that the said
 Thomas should have of the lands of the said Edward to the value,
 and that the said Edward should be amerced. And there-
 upon the said George and James prayed his majesty's writ, to be
 directed to the sheriff of the county afore said, to cause them to
 have the full seisin of the manor, tenements, and rents afore said,
 with the appurtenances, and it was granted to them, returnable
 at the next assizes into the court afore said; and that afterwards, namely,
 the fifteenth day of November, in that same Term, the said
 George and James personally came there into the said court at
 Westminster, and the sheriff, namely, Sir Robert Lecokener, returned
 to them made a return, that he by virtue of the writ afore-
 said, to him directed, on the tenth day of November then last past,
 had the said George and James to have full seisin of the manor,
 tenements, and rents afore said, with the appurtenances, as he
 been directed by the writ afore said. And the said jurors do
 hereby declare, upon their said oath, that the said Thomas Bat-
 burst afterwards and before the said time when, &c. namely,
 the twenty-fifth day of February, in the eighth year of the
 reign of his said late majesty king Charles the first, made, and as-
 signed delivered an indenture sealed with his seal, executed
 between the said Thomas Batburst (by the name of Thomas Ba-
 turst) of the one part, and Sir Walter Roberts, knight, and Henry
 Crispe, esq. (by the names of, &c.) of the other part, bearing
 date on the 25th day of February, in the eighth year of the
 reign of his said late majesty king Charles the first; the
 contents of which said indenture follows in these words (here set
 forth the indenture); as by the said last-mentioned indenture,
 shewn here to the said Justices, and proved, read, and given
 in evidence to the said jury (amongst other things), it doth and
 more fully appear. And the said jurors do farther declare,
 upon their said oath, that the said Thomas Batburst, afterwards,
 before the said time when, &c. namely, on the twenty-sixth
 day of the said month of February, in the eighth year of the
 reign of his said late majesty king Charles the first, took to wife,
 and

Plea of the
vouchee.

Imparliance.

Judgment.

Writ of seisin.

Return.

Indenture be-
tween T. B.
of the one
part, and
Walter Roberts
and Henry
Crispe of the
other part.

That the said
T. B. married,

and died
without issue,

That *Eliza-
beth* survived,
and was seised
for her life.

The reversion
expectant to
the right heirs
of *T. B.*

That *W. B.*
brother made
his will.

That the said
W. B. died;
and also the
said *Eliz.*

Entry of the
defendant
E. B. as heir
to *T. B.*

That the said
manor and te-
nements are
ancient de-
mesne held of
the manor of
Aylesford.

and was lawfully married to, the above-named *Elizabeth Bathurst* and that the said *Thomas Bathurst*, afterwards and before the time when, &c. namely, on the twenty-seventh day of February, in the ninth year of the reign of his said late majesty king *Charles* the first, died at *Gowdbursh* aforesaid, in the said county of *Kent* without any issue of his body lawfully begotten; and that said *Elizabeth* his wife survived him, and afterwards and before the said time when, &c. namely, on the twenty-eighth day of February, in the ninth year of the reign of his said late majesty king *Charles* the first, she the said *Elizabeth* entered into the said manor and tenements aforesaid, with the appurtenances, and thereof seised, for and during the term of the life of the said *Elizabeth*, the reversion belonging to the right heirs of the said *Thomas Bathurst*. And the said jurors do farther declare, upon their said oath, that afterwards, and before the said time when, &c. to wit, on the first day of October, in the year of Our Lord 1658, the said *William Bathurst*, brother to the said *Thomas Bathurst*, made his last will and testament in writing (amongst other things), in these *English* words following (set forth the *verba*); as by the said last will and testament of the said *William Bathurst*, now shewn here to the said justices, and given in evidence to the said jury, it doth and may (amongst other things) more fully and at large appear. And the said jurors do farther declare, upon their said oath, that the said *William Bathurst* afterwards, and before the said time when, &c. namely, on the eighth day of July, in the year of Our Lord 1658, died at *Eltham* in the said county; and that afterwards, before the said time when, &c. namely, on the first day of September, in the thirty-second year of the reign of his present majesty king *Charles* the second, the said *Elizabeth Bathurst* widow and relict of the above-named *Thomas Bathurst*, did enter into the said manor and tenements aforesaid, in the said county of *Kent*; and that the decease of the said *Elizabeth Bathurst*, widow and relict of the said *Thomas Bathurst*, and before the said time when, &c. namely, on the tenth day of December, in the thirty-second year of the reign of his said present majesty, the said *Edward Bathurst* the now defendant, son and heir of the said *Thomas Bathurst*, entered into the said manor and tenements, with the appurtenances, and was seised thereof, as the law requires. And the said jurors do farther declare, upon their said oath, that the said manor and tenements, with the appurtenances, now are, and so long a time as there is no remembrance of any man to the contrary, have been, of the tenure of ancient demesne of the crown of the kingdom of *England* in fee, and during the time have been and now are held of the manor of *Aylesford* in the said county of *Kent*, and that the said manor of *Aylesford* with the appurtenances, now is, and for so long a time as there is no remembrance of any man to the contrary hath been, of the tenure of the crown of the kingdom of *England*. And the said jurors do farther declare, upon their said oath, that

Edward Bathurst the son, the now defendant, being seized as a record of
 a writ of dis-
 ceit to reverse
 a recovery of
 lands in an-
 tienti demesne.
 aforesaid of and in the said manor and tenements, with the
 appurtenances, (amongst other things) it is enrolled among the
 rolls at Westminster, before Sir Francis North, knight, and his
 brethren, the Justices of the court of common pleas of our sovereign
 and the king, of Trinity Term in the thirty-third year of the
 reign of his present majesty, that the said Edward Bathurst the
 son, by the name of Edward Bathurst, esquire, son and heir of
 Edward Bathurst his father, and heir to Thomas Bathurst, esquire,
 was attached to answer to Sir Thomas Colepeppere, baronet, son
 and heir of Richard Colepeppere, baronet, and heir to Sir William
 Colepeppere, baronet, of a plea, that whereas the said Thomas
 Colepeppere for ten years then last past had been, and then was,
 seised of the manor of Aylesford, with the appurtenances, in the
 said county, in his demesne as of fee; which said manor, with
 the appurtenances, then was, and for so long a time as there
 was no remembrance of any man to the contrary had been,
 ancient demesne of the crown of England, and all the lands and
 tenements which were held of that manor had, time out of
 mind, been pleadable and impleaded in the court of the said
 manor, before the steward thereof for the time being, by his
 majesty's writ of right close, and not elsewhere, according to
 the custom of the said manor, time out of mind therein used and
 approved of: and that the said Thomas Bathurst in his life-time,
 and George Maplesden gentleman, and James Sarys gentleman,
 being now likewise dead, well knowing the premises, but con-
 sidering craftily to deceive and defraud the said William and his
 executors, lords of the said manor, of the profit of that manor;
 they the said George Maplesden and James Sarys, on the seven-
 tenth day of October, in the seventh year of the reign of his late
 majesty king Charles the first, he the said William being seised of
 the said manor, with the appurtenances, in his demesne as of fee,
 prosecuted out of the high court of chancery of his said late
 majesty (that court then being held at Westminster in the county
 of Middlesex), his said late majesty's writ of entry *sur disseisin in*
posse, against the said Thomas Bathurst, of the manor of Pullens,
 with the appurtenances, and of one messuage, &c. directed to
 the sheriff of the same county, and returnable before his said
 late majesty's justices at Westminster aforesaid, on the morrow of
 All Souls: then next ensuing; by virtue of which said writ, and
 the return thereof, such proceedings in law were made and had
 thereupon on the said morrow of All Souls, and other concurring
 circumstances requisite in such cases, that they the said George
 and James in Michaelmas Term, in the said seventh year, reco-
 vered against the said Thomas Bathurst the said manor of Pullens,
 and the said tenements and rents, with the appurtenances; as by
 the record and proceedings thereof, now remaining in his said
 majesty's court, before his Justices, to wit, at Westminster afore-
 said, it doth and may more fully and at large appear; which
 said recovery was suffered to the use of the said Thomas Bathurst
 and

and his heirs for ever; and by means of the said recovery, and by force of an act made in the parliament of our late sovereign *Henry the eighth*, late king of *England*, on the fourth day of *February*, in the twenty-seventh year of his reign, at *Westminster*, in the county of *Middlesex*, for transferring uses into possession, he the said *Thomas Batburs* became seised of and in the said manor of *Pullens*, and of the tenements and rents aforesaid, with the appurtenances, in his demesne as of fee. And he the said *Thomas Colepeppre* farther declared, that the manor, tenements and rents, with the appurtenances, specified in the said writ of entry, at the time of suing out of the said writ, and also at the time of the said recovery thereupon had, were held of the said *W. C.* as of his manor of *Aylesford* aforesaid, and during all the time aforesaid, until the day of suing out the said writ, according to the custom of the said manor of *Aylesford*, were pleadable and impleaded in the court of the said manor, and not elsewhere; by which recovery suffered in the manner aforesaid, the said manor of *Pullens*, and the tenements aforesaid, with the appurtenances, became a frank fee, and pleadable and impleaded at common law, to the deceit of the court of the said *William* lord of the manor of *Aylesford* aforesaid, and to the manifest danger of the disinherison of the said *T. C.* to the damage of the said *T. C.* forty pounds: and whereupon the said *T. C.* by *Hop Gifford* his attorney complained, that whereas the said *T. C.* for ten years then last past had been, and then was, seised of the manor of *Aylesford*, with the appurtenances [and so reciting the count in the action of deceit in the same manner with the writ above-mentioned, until you come to the words], to the damage of the said *T. C.* forty pounds, and thereof he brought his suit &c. And the said *E. B.* the now defendant, by *Edmund Hodges* his attorney, came and defended the force and injury when, &c. and pleaded that he could not deny the action of the said *T. C.* nor but that the said *Thomas* was, and for ten years last past had been, seised of the said manor of *Aylesford*, with the appurtenances, in his demesne as of fee; nor but that the said manor with the appurtenances, then was, and for so long a time as there had been no remembrance of any man to the contrary had been, ancient demesne of the crown of *England*; nor but that the lands and tenements, which were held of the said manor were time out of mind pleadable and impleaded in the court of the manor aforesaid, before the steward thereof for the time being, by his majesty's writ of right close, and not elsewhere according to the custom of the said manor, time out of mind used and approved of; and that the manor, with the tenements and rents aforesaid, specified in the said writ of entry, at the time of suing out the same, and at the time of the said recovery thereupon had and suffered, were held of the said *W. C.* as of his manor of *Aylesford* aforesaid; and during the time aforesaid till the day of suing out the said writ, had been pleadable and impleaded in the court of the said manor, according to the custom

of the said manor of *Aylesford*; as the said *T. C.* had above judgment for the plaintiff
 acknowledged, in his writ and declaration aforesaid; therefore it was in the writ of
 adjudged, that the said *T.* have again his said court, that is, descent.
 that the manor, rents, and tenements aforesaid, with the appur-
 tenances, specified in the said writ of entry, be pleaded, removed,
 and brought back again into the said court, within the jurif-
 diction thereof, notwithstanding the said judgment given upon
 the said writ of entry, in his said late majesty's court at *Westminster*
 aforesaid; and that the said recovery be annulled, and made en-
 tirely of no effect: and that the said *T.* be restored to all things
 which he lost by reason of the said judgment, given upon the
 said writ of entry; and that the said *Edward Bathurst* the de-
 fendant be amerced; as by the record thereof, now remaining at
Westminster, in the county of *Middlesex*, recorded, it doth and
 may more fully appear: And the said jurors do farther declare,
 upon their said oath, that afterwards, and before the said time
 when, &c. namely, on the first day of *April*, in the thirty-fourth
 year of the reign of his present majesty *Charles* the second, now
 King of *England*, &c. the said *Elizabeth Bathurst*, widow,
 the wife of the said *William Bathurst*, deceased, entered into the
 manor and tenements, with the appurtenances aforesaid, and
 was thereof possessed; and that the said *Elizabeth Bathurst*,
 widow, relict of the said *William Bathurst*, afterwards, and
 before the said time when, &c. namely, on the said seventh day
 of the said month of *April*, in the thirty-fourth year aforesaid,
 made, and as her deed delivered an indenture, sealed with her
 seal, executed between the said *Elizabeth Bathurst* last above
 named, by the name of, &c. of the one part, and *Thomas Crampe*,
 by the name of, &c. of the other part, bearing date on the said
 seventh day of *April*, in the said thirty-fourth year; the tenor
 of which said indenture followeth in these words [this was a
 common lease for five years, made by *Elizabeth Bathurst* to
Thomas Crampe]. And the said jurors do farther declare, upon their said
 oath, that the said *Elizabeth Bathurst* widow, relict of the said
William Bathurst, is now alive, and in good health [and then the
 jury found the lease, entry, and ouster, in the declaration, and
 made the proper general conclusion]; but whether, &c.

Entry of *Eliz-
 abeth*, relict
 of *William
 Bathurst*;

who leased to
 the lessor of
 the plaintiff
 for five years.

And that *Eliz-
 abeth* is now
 alive.

§ 3. *Norton v. Ladd.*

AS to nine acres three roods and a half of land, with the Lut. 756.
 appurtenances, part of the tenements specified in the Verdict, as to
 within declaration, the said jurors declare, upon their oath, that part, for the
 the said *John Ladd* is guilty of the trespass and ejectment within. plaintiff;
 within, in the nine acres three roods and a half of land afore-
 said, with the appurtenances, as the said *John Norton* doth within
 complain against him; and they assess the damages of the said
John Norton, by reason of the said trespass and ejectment, besides
 his

as to other
part, not
guilty.

And as to the
residue, a spe-
cial verdict;
that *Edmund
Cook* the elder,
being seised in
fee of copy-
hold lands,

and having
three sons and
three daugh-
ters,

surrendered
to the use of
his will,

and died.

his expences and costs laid out by him about his suit in that particular, to sixpence, and for his expences and costs to forty shillings: and as to one garden, &c. with the appurtenances, out of part of the tenements specified in the within declaration, with the appurtenances, they declare, upon their said oath, that the said *John Ladd* is not guilty of the within-written trespass and ejectment, in the said one garden, &c. with the appurtenances in such manner and form as the said *John Ladd* hath withalledged in his plea: and as to one messuage, &c. residue of the tenements, with the appurtenances within mentioned in the declaration, the said jurors do farther declare, upon their said oath, that long before the said within-written time when the within-specified lease was made, one *Edmund Cook*, senior, was seised in his demesne as of fee, at the will of the lord of the manor of *Thorneg cum membris*, in the county of *Norfolk*, according to the custom of the manor aforesaid, of and in the said one messuage, &c. with the appurtenances aforesaid, in *Brinton Brimham*, and *Stodey*, being customary tenements, held of the lord of the manor aforesaid, and parcel of the manor of *Thorneg cum membris*, in the said county of *Norfolk*, and demised and devisable by the lord of the said manor, or his steward thereof, the time being, by copy of the court-rolls of the said manor, any person or persons whatsoever, willing to take the same fee-simple, or otherwise, at the will of the lord, according to the custom of the manor aforesaid. And the said *Edmund Cook*, senior, being so seised thereof, and having issue three sons, of his lawfully begotten, *Robert Cook*, *Edmund Cook*, and *John Cook*, and three daughters, *Cicely*, *Ellen*, and *Alice*, he the said *Edmund Cook*, afterwards, and before the within-written time when the within-mentioned lease was made, at the court of the manor of *Thorneg cum membris* aforesaid, held there on the fifth day of *October*, in the year of Our Lord 1659, personally and in court, before the whole homage, surrendered into the hands of the lord of the manor aforesaid, by the hands of the steward of the court, all his customary messuages, lands, and tenements whatsoever, as well in possession as in reversion, within the manor, by copy of the court rolls, according to the custom of the manor aforesaid, to such use or uses as he should, by his will and testament in writing, limit or appoint; and that the said *Edmund Cook*, senior, had then *Anne* his wife; and afterwards, namely, on the ninth day of *June*, in the year of Our Lord 1668, made and ordained his last will and testament in writing, and thereby gave and devised in these following English words to wit [here was set out the will of *Edmund Cook* the elder, *hæc verba*, by which he devised the premises to his wife for her life, and the remainder to his son *Edmund* in fee]; as by the said last will and testament of the said *Edmund Cook* the father, now read here in court, and given in evidence, it doth more fully appear. And the said jurors do farther declare, upon their said oath, after the said first day of *August*, in the said year, of Our

1668, the said *Edmund Cook* the testator died at *Brinton* aforesaid: after whose death, namely, at a court specially held for the said manor of *Thornegcum membris*, on the eighth day of *May*, in the twenty-fourth year of the reign of his present majesty, the said *Edmund Cook*, the son of the said *Edmund Cook* deceased, came and brought into the same court the said last will and testament of the said *Edmund Cook* deceased, and craved of the lord of the said manor to admit him tenant to the remainder of the said one messuage, &c. with the appurtenances; whereupon the said *Edmund Cook* the son, at the same court of the manor aforesaid, was admitted tenant to the said remainder of the said tenements, with the appurtenances, to hold to him and his heirs, after the decease of the said *Anne*, according to the custom of the manor aforesaid; and the said remainder was then and there granted to the said *Edmund* the son by the lord of the said manor, according to the custom of the manor aforesaid, to hold the said tenements, with the appurtenances, to the said *Edmund* the son and his heirs, after the decease of the said *Anne*, according to the intent and purpose of the will aforesaid, at the will of the lord, according to the custom of the said manor; as by the court-rolls of the said court made thereof, here brought and shewn to this court, and read and given in evidence to the said jurors, doth more fully appear: whereby the said *Edmund* the son was seised of the said remainder, as the law requires; and being so seised thereof, afterwards, to wit, on the day and year last above mentioned, he the said *Edmund Cook* the son came into the said court of the manor aforesaid, in his own person, and in open court surrendered into the hands of the lord of the manor aforesaid, by the hands of the steward of that manor, the said one messuage, &c. with the appurtenances, to such uses or uses as he should, by his last will and testament in writing, devise and appoint, according to the custom of the manor aforesaid. And the said jurors do farther declare, upon their said oath, that the said *Edmund Cook* the son afterwards, namely, on the nineteenth day of *May*, in the year of Our Lord 1674, made his last will and testament in writing, and thereby gave and devised these *English* words following, *viz.* [here was set out the will of *Edmund Cook* the son in *hæc verba*, containing a devise of the premises to his sister *Alice* for life, remainder to his brother *John* the son; as by the said last will and testament of the said *Edmund* the son, now brought here and shewn to this court, and read and given in evidence to the said jury, it doth more fully appear; and the said *Edmund* the son afterwards, namely, on the first day of *June*, in the said year of Our Lord 1674, died at *Brinton* aforesaid, without issue of his body lawfully begotten. And his sisters, the said jurors, upon their said oath, do farther declare, that the said *Cicely*, *Ellen*, and *Alice*, sisters to the said *Edmund* the son, afterwards, namely, on the first day of *August*, in the year of Our Lord 1675, died at *Brinton* aforesaid, without any issue of their

Admission of
Edmund Cook
the son.

Surrender to
the use of his
will.

Death of *Edmund*
the son,
without issue.

Death of the mother.

Admission of John Cook, the brother of Edmund.

Letter of attorney, to surrender to the use of John Ladd and his heirs; upon condition to be void, on payment of 106l.

Surrender accordingly.

their or either of their bodies lawfully begotten; and the said *Anne Cook*, widow, the mother, survived the said *Cicely*, *Ellen*, and *Alice*; and afterwards, namely, on the first day of September, in the year of Our Lord 1675, the said *Anne Cook* died at *Brixton* aforesaid; and that afterwards, namely, on the nineteenth day of January, in the year of Our Lord 1680, the said *John Cook*, brother to the said *Edmund Cook* the son deceased, came into the court of the said manor of *Thorneg cum membris* aforesaid, held on the same day and year last mentioned, and brought into that court the last will and testament of the said *Edmund* the son, his brother, made in writing, bearing date on the nineteenth day of May, in the year of Our Lord 1674 aforesaid, and the said *John Cook* craved of the lord of the said manor to admit him tenant of the premises, according to the intent and purport of the said surrender and last will of the said *Edmund Cook* the son; whereupon the said *John Cook* was, at the said court of the same manor there held on the day and year last above mentioned, admitted a tenant to the said one messuage, &c. with the appurtenances, according to the custom of the manor aforesaid; and the said tenements, with the appurtenances, were then and there granted, in the same court, to the said *John Cook*, by the lord of the said manor, according to the custom thereof; to hold to the said *John*, according to the intent and purport of the said surrender and last will of the said *Edmund Cook* the son, at the will of the lord, according to the custom of the manor aforesaid; as by the copy of the court-rolls last above mentioned made thereupon now brought here into court, and given in evidence to the said jurors, more fully may appear; whereby the said *John Cook* entered into the said tenements, with the appurtenances, last above mentioned, and was seised thereof, as the law requires: and being so thereof seised, he the said *John Cook* afterwards, namely, on the twenty-sixth day of February, in the year of Our Lord 1682, by his writing, purporting to be a letter of attorney under the hand and seal of the said *John Cook*, bearing date the day and year last above mentioned, and attested by *J. C. senior* and *F. W. junior*, sufficiently authorized one *J. C. junior*, gentleman, a customary tenant of the manor aforesaid, to surrender into the hands of the lord of the said manor, according to the custom of that manor, the said one messuage, &c. to the use and behoof of one *John Ladd*, his heirs and assigns, for ever; upon this condition, that if the said *John Cook*, his heirs, executors and assigns, or any of them, should pay, or cause to be paid, to the said *John Ladd*, his executors, administrators, or assigns, the sum of 106l. upon the twenty-seventh day of February which should be in the year of Our Lord 1683, at or in the dwelling-house of the said *John Ladd*, situate in *Norwich* aforesaid, then the said last-mentioned surrender should be void, or otherwise should remain in its full force; and afterwards, to wit, on the fourth day of March, in the year of Our Lord 1682, the said *J. C. junior* came there into the court of the manor of *Thorneg*

said *membris* afore said, held at that manor, on the sixth day of
March, in the year of Our Lord 1682, before *William Burleigh*,
 squire, steward, and by virtue of the said writing or letter of
 attorney, according to the custom of the manor afore said, in the
 name of the said *John Cook*, surrendered into the hands of the
 lord of the said manor, by the hands of the said steward, the
 lands and tenements last above mentioned; to the use and behoof
 of the said *John Ladd*, his heirs and assigns for ever; upon this
 condition, &c. [prout]. And the jurors farther declare, upon
 their said oath, that the said *John Cook* afterwards, and before
 the within-written time when the within-specified lease was
 made, namely, on the twentieth day of *February*, in the first year
 of the reign of his present majesty, died at *Brinton* afore said,
 without issue of his body lawfully begotten; and that the said
Robert Cook then and there likewise died; and that afterwards,
 wit, on the twelfth day of *May*, in the first year of the reign of
 the said present majesty, the said *John Ladd* came into the court
 of the said manor, held at the said manor on the day and year
 above mentioned, and shewed, that neither the said sum of
 4*l.* or any part thereof, was paid, at the day and year above
 mentioned for the payment thereof, according to the intent and
 report of the last-mentioned surrender, and prayed of the lord
 of the said manor to admit him tenant to the premises afore said;
 and thereupon the said *John Ladd* was, at the same court of the
 manor afore said, admitted tenant to the said one messuage, &c.
 with the appurtenances, according to the custom of the manor
 afore said, and those tenements were then and there granted to
 the said *John Ladd*, in the same court, by the lord of the said
 manor, according to the custom of that manor; to hold to the
 said *John Ladd*, his heirs and assigns, according to the intent and
 report of the last-mentioned surrender, at the will of the lord,
 according to the custom of the manor afore said; as by the copy
 of the court-rolls last above mentioned made thereon, now shewn
 and brought into this court, and given in evidence to the said
 jurors, more fully may appear; whereupon the said *John Ladd*
 entered into the said messuage and lands, with the appurtenances,
 above mentioned, and was seised thereof, as the law requires.
 And the said jurors do, upon their said oath, farther declare, Title of the
 the said *Cicely Cook* and *Mary Cook*, named in the within declaration, lessor,
 cousins, and next heirs to the said *Edmund Cook* the son, and
 the said *John Cook*, and to the said *Cicely*, *Ellen*, and *Alice*,
 daughters of the said *Edmund Cook* the elder, that is to say,
 daughters and heirs of *Robert Cook*, brother to the said *Edmund*
Cook, son, and to *John Cook*, which said *Robert* was the eldest son
 heir to the said *Edmund Cook* the elder, grandfather of the
 said *Cicely* and *Mary* named in the declaration afore said, and fa-
 ther to the said *Robert* and *Edmund* the son, and *John Cook*; and
 the said *John Ladd* claims his right, title, and interest in
 the premises afore said, by virtue of the surrender and admission
 above mentioned. And the said jurors do farther declare,

Death of *John*
Cook and his
 brother *Rob-*
bert.

Admission of
John Ladd.

upon their said oath, that the said *Cicely Cook* and *Mary Cook*, named in the declaration aforesaid, after the decease of the said *John Cook*, and before the said time when the lease aforesaid was made, namely, on the first day of *March*, in the first year of the reign of his said present majesty, entered into the said one messuage, &c. with the appurtenances, and was seised thereof, as the law requires [and they farther found the lease, entry, and ouster]. And if the defendant be guilty of the trespass and ejectment, &c. then they find him so; and if not, then they find him not guilty.

§ 4. *Eastcourt v. Weeks.*

2. Lutw. 802.
Special ver-
dict, that the
tenements are
copyhold.

William East-
court seised of
the manor in
fee; and
William Weeks
of the copy-
hold tene-
ments for life.
Marriage of
Weeks with *E-*
lizabeth Kite.
Death of *Wil-*
liam Eastcourt;
and descent of
the manor to
Amy Eastcourt
and the lessor
of the plain-
tiff; and that
William Weeks
permitted the
messuage to be
ruinous, and
demised for a
year, and so
from year to
year, &c.

Death of *Amy*
Eastcourt, and
descent of her
moiety to the
lessor.

Death of *Wil-*
liam Weeks.

DECLARE, upon their oath, that the tenements mentioned in the within-written declaration are, and always have been, customary tenements, and parcel of the manor of *Newington* in the county of *Wills*, of which said manor *Sir William Eastcourt* knight, was seised in his demesne as of a fee; and that on *William Weeks* was seised of the said customary tenements for the term of his natural life, by copy of the court-rolls of that manor, at the will of the lord, according to the custom of the said manor; and that the said *William Weeks* being so seised of the said customary tenements, he the said *William Weeks* married *Elizabeth Kite*, and afterwards the said *William Eastcourt* died seised, as aforesaid, of the said manor; after whose decease the manor descended to one *Amy Eastcourt*, and to the within-named *Anne Eastcourt*, the plaintiff's lessor, as sisters and heirs of *William Eastcourt*; and that afterwards the said *William Weeks* permitted the within-mentioned messuage to be ruinous and out of repair, and in decay, for want of necessary repairs thereof; and that afterwards, to wit, on the twenty-fifth day of *November*, in the year of Our Lord 1699, the said *William Weeks*, by his depositions shewn to the said jurors in evidence, demised all the said customary tenements to one *Edward Browne*; to have and to hold the said *Edward Browne* from the Feast of *Saint Michael* then past, for and during the term of one whole year from the next ensuing; and so from year to year for the term of ten years then next ensuing, if the said *William Weeks* should so long happen to live, at the yearly rent of ten pounds, to be paid to the said *William Weeks* for the same; and afterwards the said *William Eastcourt* died seised of a moiety of the said manor in her demesne as of a fee, after whose death the said moiety descended to the said *Anne Eastcourt*, as sister and heir to the said *Amy*, where the said *Anne Eastcourt* was, and now is, sole seised of the manor aforesaid in her demesne as of fee; and that afterwards, on the first day of *February*, in the year of Our Lord 1696, the said *William Weeks* died seised, as aforesaid, of the said customary

tenement

tements; and that within the manor aforesaid there is, and, for Custom that
 so long a time that there is no memory of any man to the con- the wife of a
 trary, there hath been, and was a custom used and approved of, customary te-
 that the wife of every customary tenant who died seised of any nant dying
 customary tenements, parcel of that manor, of any estate therein seised for life,
 for the term of his life, hath used, and ought, to have and enjoy shall hold the
 all such customary tenements, whereof her husband died so seised, her widow-
 for and during the time of her widowhood, at the will of the hood; and
 lord of the manor for the time being, according to the custom of that the exe-
 that manor; and also that the executors and administrators of cutors of such
 every such customary tenant, dying seised of such estate as afore- tenant (if he
 said, of and in any customary tenements, parcel of the manor die between
 aforesaid, at any time after the Feast of the Birth of Our Lord *Christmas* and
Christ, and before the Feast of the *Annunciation of the Blessed Lady-day*)
Virgin Mary, hath been accustomed, and ought, to have and en- shall hold till
 joy all such customary tenements, till the Feast of *Saint Michael* the next
the Archangel next after the death of such customary tenant so *Michaelmas*.
 dying seised, and no longer; and that after the several deaths Entry of the
 of the said *William Eastcourt*, *Amy Eastcourt*, and *William Weeks*, lessor of the
 and before the Feast of *Saint Michael the Archangel* next after the plaintiff for
 death of the said *William Weeks*, to wit, on the twenty-fourth the forfeiture.
 day of *September*, in the year of Our Lord 1697, the within-
 named *Anne Eastcourt*, lessor of the plaintiff, entered in and
 upon all the said customary tenements, claiming the same as a
 forfeiture to the said *Anne*, as lady of the manor aforesaid, and
 was seised of the said customary tenements, as the law requires;
 and that the messuage aforesaid, being so out of repair, continued That the mess-
 so out of repair and in decay, for want of necessary repairing the suage, at the
 same, till the said time of the entry made by the said *Anne East-* time of such
 court, as aforesaid. And the said jurors do farther declare, upon entry, was
 their said oath, that the said messuage now is, and for the space out of repair;
 of a month last past hath been, well and sufficiently repaired, at but it is now
 the costs and charges of the said *Elizabeth*, who was wife of the in good re-
 said *William Weeks* at the time of his death; and that after the pair.
 entry made as aforesaid, to wit, on the within-written nineteenth Lease to the
 day of *January*, in the ninth year of the reign of his said pre- plaintiff, and
 sent majesty, the said *Anne Eastcourt* demised the said customary entry of the
 tenements to the within-named *John Eastcourt*, to have and to servant to
 hold to the said *John*, from the last day of *December* then last, for *Elizabeth*, the
 the term of seven years from thence next ensuing; by virtue of wife of *Wil-*
 which said demise he the said *John* entered into the said cus- *liam Weeks*.
 tomary tenements; and was possessed thereof, until the within-
 named *Alice Weeks* (as a servant to the said *Elizabeth Weeks*, who
 was wife to the said *William Weeks*, and by her special command) entered into the said customary tenements, in and upon the pos-
 session of the said *John*, and ejected, drove out, and removed
 him from his said farm therein, as the said *John Eastcourt* hath
 therein declared. And the said jurors do, upon their said oath, That the said
 farther declare, that the said *Elizabeth*, who was wife to the said *Elizabeth* is
William Weeks at the time of his death, now is, and ever since now alive, and
 the unmarried.

the death of the said *William Weeds* hath been and remained, a widow unmarried, and in good health. And then the jurors conclude (as usual).

§ 5. *King v. Dilliston.*

Lutw. 765.
3. Mod. 221.

That the tenements are copyhold.

Henry Warner
and *Elizabeth*
his wife seised
(in right of
Elizabeth)
for life.

Remainder to
John Ballett in
fee.

Custom, that
if surrender
be presented,
the party,
having a
right, shall be
thrice pro-
claimed to
come in, and
be admitted.

AND the jurors of the jury whereof mention is within made, being called, likewise appeared, who, being chosen, tried, and sworn, to declare the truth of the within-contents, declare upon their oath, that the within-written tenements, with the appurtenances, wherein the trespass and ejectment within-written are supposed to have been committed, are, and for so long a time as there is no remembrance of any man to the contrary, have been, parcel and customary tenements of the manor of *Scusling Campsey*, with the appurtenances, in the said county of *Suffolk*, and have been, during all that time, demised and demiseable by copy of the court-rolls of that manor, by the lord or lady thereof for the time being, to any person or persons whatsoever willing to take the same in fee-simple or otherwise, at the will of the lord or lady, according to the custom of the manor afore said; and that before the within-written time when the trespass and ejectment afore said are supposed to have been done, one *Henry Warner* and *Elizabeth* his wife, in right of the said *Elizabeth*, were seised of the tenements within-written with the appurtenances, in which, &c. in their demesne as of freehold for the term of the life of the said *Elizabeth*, the remainder thereof belonging to *John Ballett* and his heirs, at the will of the lord, according to the custom of the manor afore said. And the said jurors do, upon their said oath, farther declare, that within the manor afore said there now is, and for so long a time as there is no memory of any man to the contrary, there has been, such a custom, that if any surrender of any customary land or tenements of the manor afore said be made to the lord or lady of the said manor for the time being, out of the court of the said manor, according to the custom thereof, it should be presented by the homage of the court of the manor afore said, at the first court of the said manor next after such surrender, to be held at that manor; and that after such presentment, made in the manor afore said, the first publick proclamation should be made in the same first court, that such person who hath a right to be admitted to the tenements afore said, so surrendered, should appear at the court, and pray to be admitted to the customary tenements comprised in such surrender, according to the intent and purpose thereof: and if such person, who had a right to be admitted to the tenements afore said, so surrendered, came not at the same first court, and prayed to be admitted, nor was admitted to the tenements, with the appurtenances, mentioned in such surrender afore said, then at the second court of the said manor, to be held next after such surrender, another publick proclamation shall be made

made, that such person, who hath a right to be admitted as aforesaid, should appear at that same court, and should pray to be admitted to the customary tenements, according to the intent and purport of the surrender aforesaid; and if such person, who had a right to be admitted as aforesaid, came not at such second court, and prayed to be admitted, nor was admitted, to the tenements, with the appurtenances, mentioned in such surrender as aforesaid, then at the third court of the said manor, next after such surrender, held at the manor aforesaid, there should be another publick proclamation made, that such person, who had a right to be admitted as aforesaid, should come at the same third court, and pray to be admitted to the tenements mentioned in such surrender: and if such person came not at that court, and prayed to be admitted, nor was admitted, to the said tenements, with the appurtenances, then the steward of the said court for the time being commanded, and by the custom of the manor aforesaid therein used and approved of for so long a time as there is no remembrance of any man to the contrary, hath used to command, the bailiff of the said manor for the time being to seize such tenements, so surrendered into the hands of the lord or lady of the said manor for the time being. And the said jurors do, upon their said oath, farther declare, that the said *Henry Warner* and *Elizabeth*, in right of the said *Elizabeth*, being seized of the tenements within-written, with the appurtenances, wherein, &c. in the manner aforesaid, and the remainder thereof belonging to the said *John Ballett* and his heirs in the manner aforesaid, they the said *Henry Warner* and *Elizabeth*, and *John Ballett*, before the within-written time when, &c. that is to say, on the sixth day of *April*, in the thirty-fourth year of the reign of his late majesty, surrendered out of court, according to the custom of the manor aforesaid, into the hands of the said *Alice*, then lawfully being the lady of the manor aforesaid, the within-written tenements, with the appurtenances, wherein, &c. to the use of one *Robert Freeman* and his heirs for ever; and that the said *Robert Freeman*, after the surrender made in the manner aforesaid, and before any court of the said manor was held after making the said surrender, that is to say, on the first day of *August*, in the thirty-fourth year of the reign of his said late majesty, died; and that one *John Freeman* was and is the only son and heir of the said *Robert Freeman*, and, as such son and heir of the said *Robert*, had a right to be admitted to the tenements aforesaid, with the appurtenances, wherein, &c. according to the form and effect of the said surrender, made in the manner aforesaid. And the said jurors do, upon their said oath, farther declare, that the said *John Freeman*, at the time of the death of the said *Robert Freeman* his father, was, and now is, within the age of twenty-one years; and the said *John Freeman*, being within the age of twenty-one years, and he the said *John Freeman* having a right to be admitted to the tenements aforesaid, with the appurtenances, under the said surrender, made by the

And if he will not come in upon the third proclamation; the premises are to be seized to the use of the lord.

Surrender of *Henry Warner* and *Elizabeth*, and *John Ballett*, into the hands of the lessor of the plaintiff, she being lady of the manor.

To the use of *Robert Freeman* and his heirs. Death of *Robert Freeman* before any court (*Joan Freeman*, his son and heir, within age).

Presentment of the Surrender.

First procla-
mation.

First default.

Second pro-
clamation.

Second de-
fault.

Third pro-
clamation.

Third de-
fault.

Mandate to
seize the
lands.

said *Henry Warner* and *Elizabeth*, and *John Ballett*, into the hands of the said *Alice* as aforesaid, afterwards, that is to say, at the court of the manor aforesaid, next after the said surrender made as aforesaid, held at that manor on the fifth day of *September* in the thirty-fourth year of the reign of his said late majesty, was duly, and according to the custom of the manor aforesaid, presented by the homage of the same court; and immediately after such presentment of the said surrender, made in the same court by the homage aforesaid, the first publick proclamation was made in the same court, that such person as had a right to be admitted to the tenements aforesaid, with the appurtenances, should come at the same court there held as aforesaid, and pray to be admitted to the said tenements, surrendered as aforesaid; and that he appeared not at the same court, nor was admitted to the said tenements; whereupon, afterwards, at the second court of the said manor next after the said surrender made as aforesaid, held at that manor on the thirteenth day of *June*, in the thirty-fifth year of the reign of his said late majesty, another publick proclamation was made in the same court, that such person as had a right to be admitted to the said tenements, should come at the same court there held as aforesaid, and pray to be admitted to the said tenements, surrendered as aforesaid; and that no person came at that same court, nor was admitted to the said tenements with the appurtenances: whereupon afterwards, at the third court of the manor aforesaid next after making the said surrender as aforesaid, held at that manor, on the twenty-third day of *October*, in the said thirty-fifth year of the reign of his said late majesty, another publick proclamation was made in the same court, that such person as had the right to be admitted to the said tenements, surrendered as aforesaid, should come at the same court, there held as aforesaid, and pray to be admitted to the said tenements, surrendered as aforesaid; and that no person came at the same court, nor was admitted to the said tenements with the appurtenances: whereupon one *Thomas Clarke*, the bailiff of the said manor, was commanded by the steward of the manor aforesaid, that he should seize the said tenements, with the appurtenances, into the hands of the said *Alice*, then lady of the manor aforesaid: which said *Thomas Clarke*, afterwards that is to say, on the first day of *November*, in the thirty-fifth year aforesaid, entered into the said tenements, with the appurtenances, by virtue of the said mandate. And the said jurors do upon their said oath, farther declare, that the said *Alice* was at the time when the said surrender was made, and ever since has been, and now is, lady of the manor aforesaid, and thereof lawfully seised; and that after the said several proclamations, and the several defaults made as aforesaid, and before the making of the within-written demise, that is to say, on the first day of *April*, in the first year of the reign of his said present majesty within specified, she the said *Alice* being lady of the said manor and the said *John Freeman* then and now being of the age

twenty

twenty-one years, she the said *Alice* entered into the tenements Entry for the within specified, with the appurtenances, wherein, &c. as forfeitured. seised to her, for the reason aforesaid, and was thereof seised as the law requires; "and then they find the lease, entry, and ouster; and if the defendant be guilty of the trespass and ejectment, then they find him so; and if not, then they find him not guilty."

§ 6. *Hunt v. Bourne and Others.*

DECLARE upon their oath, that *Thomas Andrews*, on the fourteenth day of *February*, in the fourteenth year of the reign of his late majesty *James the first*, late king of *England*, &c. was seised of the lands and tenements mentioned in the within-written declaration, in his demesne as of fee; and being so seised thereof, he the said *Thomas Andrews*, by a certain indenture, bearing date on the fourteenth day of *February*, in the said fourteenth year of the reign of the said late king *James the first*, executed between the said *Thomas Andrews* by the name of, &c. of the one part, and *Toby Pavie*, of, &c. and *Philip Andrews*, of, &c. of the other part, for the considerations mentioned in the same indenture, gave, granted, enfeoffed, and confirmed to the said *Toby Pavie* and *Philip Andrews*, and their heirs, the said lands and tenements, to the several uses declared and specified in the same indenture, that is to say, to the use of the said *Thomas Andrews* and *Eleanor* his wife, for the term of their natural lives, and the life of the longest liver of them, without impeachment of waste during the life of the said *Thomas Andrews*; and after their decease, then to the use of one *Mary Andrews*, mentioned in the said indenture, daughter of the said *Thomas Andrews*, and of the heirs of the body of the said *Mary*, begotten or to be begotten by one *John Gwillim* the younger, mentioned in the said indenture; and for default of such issue, then to the use of the heirs begotten on the body of the said *Mary*; and for default of such issue, then to the use of one *Elizabeth Tomkins*, another daughter of the said *Thomas Andrews*, and the heirs begotten of the body of the said *Elizabeth*; and for default of such issue, then to the use of *William Tomkins*, eldest son of the said *Elizabeth Tomkins*, and of the heirs begotten of the body of the said *William Tomkins*; and for default of such issue, then to the use of *John Tomkins*, second son of the said *Elizabeth*, and of the heirs of the body begotten of the body of the said *John Tomkins*; and for default of such issue, then to the use of the right heirs of the said *Thomas Andrews* for ever; as in the said indenture it is more fully contained. And the said jurors do, upon their said oath, farther declare, that by virtue of the said indenture, and also by force of the statute for transferring uses into possession, published in the parliament of the eighth, late king of *England*, &c. held at *Westminster*, of *Thomas Andrews*.

Lutw. 770.
Thomas Andrews seised in fee;

conveys the premises by indenture,

to the use of himself and his wife for life; remainder to *Mary Andrews* his daughter; in special tail; remainder to the said *Mary Andrews*, in general tail; remainder to *Elizabeth Tomkins*, another daughter, in general tail; remainder to *William Tomkins*, the eldest son of the said *Elizabeth*, in general tail; remainder to *John Tomkins*, another son of the said *Elizabeth*, in general tail; remainder to the right heirs of the said *Thomas Andrews*.

Marriage of
J. Gwillim
with M. An-
drews, who
had issue T. G.
Death of T. A.
and his wife.
Entry of J. G.
and M. his
wife.

Death of J. G.
and his wife.
Entry of T. G.
their son and
heir,

who had issue
T. G.

That the te-
nements are
held of the
manor of
Wormelow,
which is an-
cient demesne,

and pleadable
by writ of
right close,
before the
steward, &c.
of the manor.
That fines are
levied in that
court,

That a fine
sur concessit
was accor-
dingly levied
of the pro-

on the fourth day of February, in the twenty-seventh year of his reign, they the said Thomas Andrews and Eleanor his wife became seised of the said lands and tenements, mentioned in the said declaration, in their demesne as of freehold, for the term of their natural lives; the remainder thereof as in the manner above limited; and that after making the said indenture, the said John Gwillim the younger married the said Mary Andrews, and had issue begotten between them, one Thomas Gwillim their eldest son; and that afterwards, and before the said twenty-ninth day of May, in the year of Our Lord 1646, they the said Thomas Andrews and Eleanor his wife died; and that after their decease the said John Gwillim the younger, and Mary his wife, entered into the lands and tenements above-mentioned in the said declaration, and were seised thereof, in right of the said Mary, in their demesne as of fee-tail, that is to say, to the said Mary and the heirs of her body begotten by the said John Gwillim the younger, remainder thereof in the manner above-limited; and being so seised thereof, they the said John Gwillim and Mary his wife, afterwards and before the said twenty-ninth day of May, in the year of Our Lord 1646, died; and after their decease, the said Thomas Gwillim, as son and heir of the said Mary, begotten of her body by the said John Gwillim the younger, entered into the lands and tenements, with the appurtenances, and was there seised in his demesne as of fee-tail, the remainder thereof in the manner above-limited; and being so seised thereof, he the said Thomas Gwillim had issue begotten of his body, one Thomas Gwillim his son. And the said jurors do, upon their said oath farther declare, that the said messuage, lands, and tenement above specified in the said declaration, and also divers other messuages, lands, and tenements, within the said parish of King Caple, are held of the said manor of Wormelow, in the said county of Hereford, which said manor now is, and for so long time there is no remembrance of any man to the contrary, hath been of ancient demesne of our sovereign lord and lady the king and queen of England, and their predecessors, kings and queens of England; and that the said tenements have been, during all the time, pleadable and impleaded in the court of the said manor or hundred, by their majesties inferior writ of right close, before the steward, suitors and domesmen of the said manor and hundred, or their deputies, or attornies; and not elsewhere, nor otherwise; and by an ancient custom of the said manor and hundred, time out of mind therein used and approved of, the said manor or hundred, founded upon writs of right close of messuages, lands, meadows, pastures, furze, and heath, within and being held of the said manor, or appertaining thereto, have been levied, and during the time aforesaid have been used and accustomed to be levied, in the said court of the manor aforesaid; and that a certain fine was produced in evidence to the said jury, was levied in the court of the right honourable the lady Elizabeth, countess of Kent, the lady of her manor or hundred of Wormelow aforesaid, where

etc. held at *King's Cople*, within the manor or hundred aforesaid, according to the said custom time out of mind used and approved of within the said manor, on the twenty-ninth day of *May*, in the twenty-second year of the reign of his late majesty *Charles the first*, king of *England*, &c. before, &c. then suitors and domestics of the said court, and others of his said majesty's subjects, then present there, between *William Nurse*, *Sarah* his wife, and *John Nurse* their son, plaintiffs, and the said *Thomas Gwillim* the father, and *Mabell* his wife, deforciant, of the said messuages, lands, and tenements, mentioned in the said declaration: by which said fine, the said *Thomas Gwillim* the father granted to the said *William Nurse* and *Sarah* his wife, and to *John Nurse*, son of the said *William* and *Sarah*, the lands and tenements aforesaid, above-mentioned in the said declaration, being held of the manor aforesaid, for the term of the lives of the said *William Nurse* and *Sarah* his wife, and of the said *John Nurse*, and of the life of the longer liver of either of them, whereby reserving an annual rent of six pounds; during the said term, as it is more fully comprehended in the said fine; the tenor of which fine follows in these words: "*Wormelow, ff.* This is a final agreement, &c. (set forth the fine in *hac verba*.) But the said jurors do, upon their said oath, farther declare, that the said messuage, lands, and tenements, mentioned in the said fine, were not usually demisable, at the time of levying the fine aforesaid; and that the said annual rent, reserved by the said fine as aforesaid, was not the ancient rent of the said tenements: by virtue of which said fine, they the said *William Nurse* and *Sarah* his wife, and *John Nurse*, entered into the lands and tenements aforesaid, and were seised thereof, as the law requires; and being so seised thereof, he the said *Thomas Gwillim* the father, being seised of the reversion of the messuage, lands, and tenements aforesaid, certain other fine, produced in evidence to the said jurors, was tried in the said court of the right honourable the lady *Elizabeth*, Countess of *Kent*, then lady of her said manor or hundred of *Wormelow*, held at *Polston* in the parish of *King's Cople*, within the jurisdiction of that court, according to the custom aforesaid, and approved of within the said manor, during the whole time aforesaid, on *Friday* the second day of *June*, in the twenty-fourth year of the reign of our said late sovereign lord *Charles the first*, late king of *England*, &c. before, &c. then suitors and domestics of the said court, and others of his said majesty's subjects then present there, between one *Thomas Marrett*, plaintiff, and the said *Thomas Gwillim* and *Mabell* his wife, deforciant, of the said messuage, lands, and tenements, mentioned in the said declaration; by which last-mentioned fine, the said *Thomas Gwillim* and *Mabell* granted to the said *Thomas Marrett*, and his wife, the said messuage, lands, and tenements, mentioned in the said written declaration, as in the said fine it is more fully expressed; the tenor of which said fine follows in these words: "*Wormelow, ff.* This is a final agreement." [set forth the fine

misces, by *Thomas Gwillim* the father, and his wife,

to *W. N.* and *S.* his wife, and *J. N.* their son, for their lives, reserving an annual rent of six pounds.

The fine in *hac verba*. That the premises, at the time of the fine, were not usually demisable, nor was the rent reserved the ancient rent. Entry of the consuees. *T. G.* the father, being seised of the reversion, he and his wife levied a fine thereof

to *Thomas Marrett*.

The fine in
hæc verba.

That the last
fine was levied
to the use of
T. G. the fa-
ther.

Conveyance
from T. G. the
father, by
bargain and
sale enrolled,
to Thomas
Payne and his
heirs.

Release of
Thomas Gwil-
lim the father
to said Thomas
Payne and his
heirs.

Death of T. G.
the father,

in hæc verba.] And the said jurors do, upon their said oath farther declare, that the last-mentioned fine was so levied to the use of the said Thomas Gwillim the father, his heirs and assigns for ever: by virtue of which said fine, and also by force of the said act for transferring uses into possession, the said Thomas Gwillim was seised of the said tenements, specified in the within-written declaration, as the law requires; and being so seised thereof, by a certain indenture, produced in evidence to the said jurors, bearing date on the first day of November, in the twenty-fourth year of the reign of his said late majesty Charles the first late king of England, executed between the said Thomas Gwillim the father, by the name of, &c. of the one part, and Thomas Payne, of, &c. of the other part, he the said Thomas Gwillim the father, for the considerations mentioned in the same indenture, enfeoffed, bargained, and sold to the said Thomas Payne and his heirs, the said messuage, lands, and tenements, mentioned in the said indenture. And the said jurors do, upon their said oath farther declare, that the said last-mentioned indenture was enrolled of record in the county of Hereford, among the records of the same county, according to the direction of the statute in such case made and provided, before Thomas Baskerville, esquire, the one of the justices assigned to keep the peace in and for the said county of Hereford, and Miles Hill, gentleman, then clerk of the peace of the said county, within six months next after making the said indenture, that is to say, on the fifteenth day of March in the year of Our Lord 1648: by virtue of which said bargain and sale, and also by force of the said act for transferring uses into possession, the said Thomas Payne was seised of the said reversion of the tenements mentioned in the said declaration, as of fee and right, as the law requires. And the said jurors do, upon their said oath, farther declare, that the lands and tenements aforesaid, mentioned in the declaration aforesaid, and the lands and tenements in the said last-mentioned fine, are the same and not different or separate lands and tenements. And they farther declare, that by a release produced in evidence to the said jury, bearing date on the nineteenth day of November, the year of Our Lord 1649, he the said Thomas Gwillim, for the considerations therein mentioned, gave, granted, remitted, released, and quit-claimed, to the said Thomas Payne (being seised of the reversion of the said tenements in the manner aforesaid), and to his heirs, all the title, interest, term, and demand whatsoever, of the said Thomas Gwillim, in the lands and tenements mentioned in the said release, being the lands and tenements mentioned in the said declaration, as in the same release is more fully expressed; the tenor of which release follows these words: To all to whom this present writing shall come &c. (set forth the release *in hæc verba.*) And the said jurors do, upon their said oath, farther declare, that afterwards, namely, on the twentieth day of June, in the year of Our Lord 1663, the said Thomas Gwillim the father died; and that the

Thomas Gwillim the younger, being then of the full age of twenty-one years, was son and heir of the said *Thomas Gwillim* the father; and that the said *Thomas Gwillim* the younger had issue, begotten of his body, the said *Richard Gwillim*, the lessor of the premises; and that the said *Thomas Gwillim*, the father of the said *Richard*, afterwards, and before the time of the demise in the said declaration above supposed to have been made, died; and that the said *Richard Gwillim* is son and heir to the said *Thomas Gwillim* his father, and nephew and heir to the said *Mary Andrews*, lawfully issuing from her body. And the said jurors do, upon their said oath, farther declare, that the said *Thomas Payne* being seised, in the manner aforesaid, of the said reversion of the tenements specified in the said declaration, he the said *Thomas Payne*, afterwards, and before the time of the demise supposed in the declaration aforesaid, namely, on the twentieth day of September, in the year of Our Lord 1661, died so seised thereof; after whose decease, the said reversion of the same tenements descended to one *John Payne*, as son and heir of the said *Thomas Payne*; whereby the said *John Payne* became seised of the said reversion of those tenements, as of a fee and right, as the law requires: and being so seised thereof, he the said *John Payne* afterwards, and before the time of the demise supposed in the said declaration, namely, on the twenty-eighth day of December, in the year of Our Lord 1661, died without issue springing from his body, being seised of such his estate in the manor aforesaid: after whose decease, the said reversion of the tenements aforesaid descended to the said *Margaret* wife of the said *Edward*; to *Mary* the wife of the said *Andrew*, and to *Mary Meyrick*, as co-heirs of the said *John Payne*; whereby the said *Edward* and *Margaret* his wife, in right of the said *Margaret*, and the said *Andrew* and *Mary* his wife, in right of the said *Mary*, and the said *Mary Meyrick*, were seised of the said reversion of the tenements aforesaid, as of a fee and right, as the law requires; and that the said *Thomas Payne*, during his life, and after making the said indenture of bargain and sale enrolled as aforesaid, and, after his decease, the said *John Payne* in his lifetime, and, after his decease, the said *Edward*, *Margaret Andrews*, and *Meyrick*, respectively received, and quietly enjoyed, the said annual rent of six pounds reserved as aforesaid, during the continuance of the said grant and demise, made for three lives as aforesaid. And the said jurors do, upon their said oath, farther declare, that the said *Mary Nurse* survived the said *William Nurse* and *John Nurse*, who died seised of the said tenements specified in the said declaration; and that she the said *Sarah* died on the seventeenth day of September, in the year of Our Lord 1693, seised of the said tenements specified in the said declaration as aforesaid; and that after the decease of the said *Sarah*, the said *Edward Bourns* and *Margaret*, in right of the said *Margaret*, the said *Andrew* and *Mary*, in right of the said *Mary*, and the said *Mary Meyrick*, entered into the said messuage lands and tenements mentioned in the

leaving *T. G.* the son, of full age, who had issue the lessor of the plaintiff.

Death of *T. Payne*, and descent of the reversion to *John Payne*, his son and heir.

Death of *J. Payne* without issue, and descent of the reversion to the defendant as co-heir.

That *Thomas Payne* and his heirs received the annual rent, &c.

Death of the survivors of the three lesses.

Entry of the defendants, and of the lessor (being within age).

the

the declaration aforesaid, and were seised thereof, as the law requires; and that afterwards, and before the time of the demise above mentioned in the said declaration, the said *Richard G-william* entered into the said messuage lands and tenements above mentioned in the within-written declaration, and was seised thereof, as the law requires, he the said *Richard* then and yet being within the age of twenty-one years. They farther find the lease, entry, and ouster; and if, &c. (with the general conclusion.)

Judgment for the plaintiff after a verdict on a trial at bar; and a writ of possession awarded, with the return thereof.

Jud. 74.

AT which day, the jury aforesaid being respited between the parties aforesaid, in the said action, &c. And now here, at this day, cometh as well the said plaintiff as the said defendant by their attornies aforesaid, and the jurors impanelled, being called, likewise came, who being elected, tried, and sworn to declare the truth of the premises, as to the trespass and ejectment aforesaid, in ten acres of land, and eighty-four acres of wood, in *W.* aforesaid, parcel of the tenements aforesaid, above supposed to be done, they declare upon their oaths, that the said (defendants) are thereof guilty, as the said plaintiff hath above thereof complained against them; and they assess the damages of him the said plaintiff, occasioned by the said trespass and ejectment, besides his costs, &c. to ten shillings; and for those costs and charges to twenty marks; and as to the residue of the trespass and ejectment aforesaid, in the residue of the tenements aforesaid, with the appurtenances, above supposed to be done the jurors aforesaid do farther declare, upon their said oath that the defendant is in no wise guilty thereof, as the said defendants have above alledged; therefore it is adjudged, that the said plaintiff do recover against the said defendants her term aforesaid yet to come, of and in the said ten acres of land, and eighty-four acres of wood, with the appurtenances, in *W.* aforesaid, wherein the said defendants are by the jurors aforesaid above found to be guilty of the trespass and ejectment aforesaid, and his damages aforesaid, assessed by the jurors aforesaid, in the manner aforesaid; and also twenty-one pounds three shillings and four-pence, at his request, &c. which said damages in the whole do amount to —l. And be the said defendant taken, &c. And be the said plaintiff amerced for his false plaint against the said defendants, for the residue of the trespass and ejectment aforesaid, whereof the said defendants are above acquitted by the said jurors. And the said defendants may go thereof, without day, for ever dismissed, &c. And hereupon the plaintiff prayeth a writ, &c. and it is granted to him, returnable here on the morrow of the *Holy Trinity*, &c.: at which day the said plaintiff comes here by his attorney aforesaid, and

the sheriff, that is to say, *M. W.* knight and baronet, now re-
 turneth, that he, by virtue of the writ aforesaid to him directed,
 did, on the eleventh day of *June* last past, cause the said plaintiff
 to have his possession of his term aforesaid, of and in the tene-
 ments aforesaid, with the appurtenances, yet unexpired, as by
 the writ aforesaid he was commanded, &c.

Judgment by nil dicit.

AND the said defendant, by *A. B.* his attorney, comes and 3.T.Jud.117.
 defends the force and injury, &c. and hereupon the said
 plaintiff prays that the said defendant may answer to the said
 declaration; and the said defendant says nothing thereto in bar,
 or to preclude the said plaintiff from his action, but makes de-
 fault; whereby the said plaintiff remains against the said de-
 fendant undefended: wherefore it is considered, that the said
 plaintiff do recover against the said defendant his possession of
 the said term yet to come, of and in the said tenements, with the
 appurtenances, and his damages occasioned by the trespass and
 ejectment aforesaid: but because it is unknown what damages
 the plaintiff hath sustained by reason of the trespass and eject-
 ment aforesaid, the sheriff is commanded, that, by the oath of
 twelve honest and lawful men of his bailiwick, he diligently in-
 quire what damages the plaintiff hath sustained, as well by rea-
 son of the said trespass and ejectment, as for his costs and ex-
 pences laid out by him about his suit in that behalf; and that
 because the inquisition which he shall take, &c. to be made ap-
 parent to our sovereign lord the king at *Westminster*, in three
 weeks from the day of *Saint Michael*, under the seal, &c. and
 seals, &c.: the same day is given to the said plaintiff. And
 hereupon the said plaintiff prays his majesty's writ of possession,
 (as hereafter.)—

Judgment by non-sum informatus.

AND the said *C.* by *B. T.* his attorney, comes and defends 3.T.Jud.116.
 the force, injury, and damages, and whatever else he
 hath to defend, where and when the Court will consider thereof;
 hereupon the said *A.* prays that the said *C.* may make an-
 swer to his said declaration: upon which the said *E.* says, that
 he is not instructed by his client, the said *C.* to give any answer
 to the above complaint of the said *A.* nor says he any thing in
 bar, or to preclude the said *A.* from his said action; whereby
 the said *A.* remains against the said *C.* undefended therein: for
 which reason it is considered, that the said *A.* do recover against
 the said *C.* his possession of the said term yet to come, of and in
 the

the said tenements, with the appurtenances, and his damages occasioned by the said trespass and ejectment: but because it is unknown what damages the said *A.* hath sustained by reason of the said trespass and ejectment, the sheriff is commanded, that he diligently inquire, by the oaths of twelve honest and lawful men of his bailiwick, what damages the said *A.* hath sustained as well by reason of the said trespass and ejectment, as for his expences and costs laid out by him about his suit in that behalf; and that the sheriff cause the inquisition which he shall take thereon to be before our sovereign lord the king [if by original on a general return day; if by bill, on a day certain], under his seal, and the seals of those by whose oaths he shall take such inquisition: the same day is given to the said *A.* to be here, before our sovereign lord the king. And thereupon the said *A.* pray a writ of our said sovereign lord the king, to be directed to the sheriff of the said county, to cause him to have the possession of his said term of and in the said tenements, with the appurtenances, yet to come; and it is granted to him, returnable before at the time aforesaid, &c.

A judgment by non sum informatus, with a remittitur damna.

AND the said *Matthew Dimmock*, by *John Lilly* his attorney comes and defends the force, injury, and damages, and whatever else he ought to defend, where and when the Court will consider thereof; and hereupon the said *James Hicks* pray that the said *Matthew* may make answer to his said declaration upon which the said attorney, for the said *Matthew*, saith, he is not instructed by the said *Matthew* his client to give any answer to the said complaint of the said *James*, nor says any thing in bar, or to preclude the said *James* from his said action, where the said *James* remains against the said *Matthew* undefended therein: therefore it is considered, that the said *James* do recover his said term of and in the said tenements, with the appurtenances, against the said *Matthew*, and his damages occasioned by the said trespass and ejectment, to be awarded to him &c. And the said *James*, of his own accord, remits and releases to the said *Matthew* all such damages so awarded to him; therefore the said *Matthew* is acquitted of all such damages. And the said *James* prays a writ of our said sovereign lord the king to be directed to the sheriff of the said county, to cause him to have the possession of his said term yet unexpired, of and in the said tenements, with the appurtenances; and it is granted to him, returnable before our said sovereign lord the king [if by bill, on a day certain; if by original, on a general return day, wheresoever he shall then be in *England*]: the same day is given to the said *James* to be here, &c.

Judgment by relicta verificatione.

AT which day came here the parties aforesaid, &c. And 1.T. Jud. 110.
 Hereupon the defendant doth relinquish his averment aforesaid, &c. (as in other actions); nor but that he is guilty of the trespass and ejectment aforesaid, as the said plaintiff hath above complained against him; therefore it is considered, that the said plaintiff do recover against the said defendant his term aforesaid, and in the tenements aforesaid, with the appurtenances, yet expired; and his damages occasioned by the trespass and ejectment aforesaid: but because it is unknown what damages, &c. under the seal, &c. and the seals, &c.

Judgment for the plaintiff for part.

THEREFORE it is considered, that the said plaintiff do recover against the said defendant his term aforesaid, of and the said two hundred and sixty acres of wood, with the appurtenances; forasmuch as the said defendant is, by the jurors aforesaid, above found to be guilty of the trespass and ejectment aforesaid; and his damages aforesaid, assessed by the said jurors forty-one shillings, &c. and also six shillings, awarded by this court to the said plaintiff at his request, &c. which said damages the whole amount to eight pounds twelve shillings; and be the said defendant taken, &c. And be the said plaintiff amerced his false complaint against the said defendant, for the residue of the trespass and ejectment aforesaid, whereof the said defendant is above acquitted by the jurors aforesaid; and the said defendant may go hence thereof for ever dismissed, &c. And hereupon the said plaintiff prayeth a writ of our sovereign lord the king, to be directed to the sheriff of the county, to cause him to have his possession of his term aforesaid yet unexpired, of and in the said two hundred and sixty acres of wood, and the appurtenances, and it is granted to him, returnable here eight days of Saint Hilary, &c.

Similar judgment; with a remittitur damna.

AFTERWARDS the process being continued between the parties aforesaid, in the said action, the jurors were there respited between them here until this day, that is to say, seven days from the Feast of Easter, in the sixth year of the reign of our sovereign lord the king; unless, &c. And now, afterwards, &c. And hereupon the said P. here in court, remits to the said R. B. and A. the said sixpence for the damages

damages aforesaid, assessed by the said jurors in the manner aforesaid; and also the increase of the same to be awarded to him; therefore it is considered that the said *P.* do recover against the said *R. R.* and *A.* his term aforesaid, of and in the tenements aforesaid, with the appurtenances, yet unexpired, forasmuch as by the jurors aforesaid, the said *R. R.* and *A.* are above found to be guilty of the trespass and ejectment aforesaid: and it is also considered that the said *P.* do recover against the said *R. R.* and *A.* the said fifty-three shillings and four pence, assessed by the said jurors in the manner aforesaid, and also seven pounds six shillings and eight pence, awarded by the court to the said *P.* at his request, &c. which said costs and damages in the whole do amount to ten pounds: and be the said *R. R.* and *A.* taken, &c. and be the said *P.* amerced for his false complaint against the said *R. R.* and *A.* of the residue of the trespass and ejectment aforesaid, whereof the said *R. R.* and *A.* respectively are acquitted by the said jurors. And the said *R. R.* and *A.* of the residue of the trespass and ejectment aforesaid, and of the said sixpence for the damages aforesaid assessed by jurors in the manor aforesaid, may go hence, therefor ever dismissed, &c. And hereupon, &c.

Judgment against several defendants, of several parcels of land and several damages found, and costs against all.

2. T. Jud.
120. 122.
Jud. 75.

AT which day the jurors, &c. Afterwards, &c. Therefore it is considered that the said plaintiff do recover against the said *T. B.* his term aforesaid, yet unexpired, of and in one messuage, eight acres of meadow and seven acres of pasture with the appurtenances (wherein the said defendants are by the said jurors above found to be guilty of the trespass and ejectment aforesaid); and his damages occasioned by that trespass and ejectment, done to the said plaintiff by the said *T.* in the manner aforesaid; besides his costs and charges aforesaid assessed by the jurors aforesaid to twopence in the manner aforesaid: and against the said *I.* his term aforesaid, yet unexpired, of and in the said one cottage, with the appurtenances (wherein the said *I.* is by the said jurors above found to be guilty of the trespass and ejectment aforesaid); and his damages occasioned by that trespass and ejectment done to the said plaintiff by the said *I.* in the manner aforesaid; besides his costs and charges aforesaid, assessed by the jurors aforesaid to twopence in the manner aforesaid: [and so against the rest of the defendants, where there are several ejectors.] And it is also considered that the said plaintiff do recover against the said *T.* and *I.* his damages, costs and charges by him, &c. likewise assessed to the said forty shillings, in the manner aforesaid, and also eight pounds adjudged to the said plaintiff at his request, &c.

quest for his costs, &c. which said damages, costs and charges, besides the several damages aforesaid, in the whole amount to ten pounds. And that the said T. and I. be taken, &c. And be the said plaintiff amerced for his false plaint against the said T. and I. of the residue of the trespass and ejectment aforesaid, whereof the said T. &c. are by the jurors aforesaid above acquitted, and the said T. and I. &c. may depart the court here, therefrom for ever dismissed. And hereupon the said plaintiff prayeth a writ of our sovereign lord the king, to be directed to the sheriff, &c.

Judgment where one of the defendants was found not guilty, as to part; and the others not guilty as to all.

BE the said L. taken, &c. And be the said plaintiff amerced ^{2. T. Jud. 119.} for his false complaint against the said T. for the residue ^{Jud. 81.} of the trespass and ejectment aforesaid, and against C. and R. of the whole trespass and ejectment aforesaid, whereof the said T. C. and R. are by the said jurors wholly acquitted, and the said T. C. and R. may go hence, thereof for ever dismissed, &c. And hereupon, &c.

Judgment for the plaintiff, where the term is expired.

AT which day the jurors, &c. Afterwards, &c. And because the justices here will advise themselves [and so continue till the Term of which judgment is entered.] At which day came here, as well the said R. as the said L. by their attorneys aforesaid; and hereupon the premises being seen, and by the justices here fully understood; for that it sufficiently appeareth ^{2. T. Jud. 117.} to this court here, that the said term of three years is fully past, ^{Jud. 81.} it is considered that the said R. do recover against the said L. his damages aforesaid, assessed by the said jurors to forty shillings, &c. and also, &c. which said damages in the whole amount to seven pounds; and be the said L. taken, &c.

Judgment by default on a scire facias.

BUT made default; therefore it is considered, that the said John Jones have his possession of the said term, yet to come, of and in the several tenements aforesaid, with their appurtenances, and also his execution against the said A. for his damages, according to the force, form, and effect of the said recovery, by the default of the said Artbur, &c.

No. IX.

Writ of habere facias possessionem; with a fieri facias for costs.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. the sheriff of Oxford, greeting: Whereas Richard T. lately our court before us at Westminster, by our writ, [if by original if by bill, then by bill without our writ, and by the judgment of the same court,] recovered against T. B. late of London yeoman, his term, yet unexpired, of and in six messuages, &c. [the premises recovered] with the appurtenances, in the parish of Stanton Harcourt, in your county; and also of and in the rectory of Stanton Harcourt, with the appurtenances, in your county, which one W. M. on the seventh day of April, in the second year of our reign, demised to the said Richard for term of years which is not yet expired, that is to say, from the first day of the same month of April, to the full end and term of ten years then next following, and fully to be complete and ended; by virtue of which said demise the said Richard entered into the said rectory and tenements, with the appurtenances and was thereof possessed, until the said Thomas afterwards, that is to say, on the same seventh day of April, in the said second year of our reign, with force and arms entered into the said rectory and tenements, with the appurtenances, in and upon the possession of the said Richard, thereof, and ejected, drove out and removed the said Richard from his said farms, the said term then and yet being unexpired, and did and still doth withhold the possession of the same from the said Richard; whereof the said Thomas is convicted, as appears to us of record: and forasmuch as it is adjudged in our same court before us, that the said Richard have execution upon his said judgment against the said Thomas, according to the force, form, and effect of the said recovery; therefore we command you, that without delay you cause the said Richard to have his possession of his said term yet unexpired, of and in the said rectory and tenements, with the appurtenances: and in what manner you shall have executed this precept do you make appear to us, in three weeks from the day of Saint Martin, wherever we shall then be in England. We likewise command you, that you cause to be made ten pounds and six pence of the goods and chattels of the said T. in your bailiwick, which were awarded to the said R. in our same court for his damages which he sustained by reason of the said trespass and ejectment; and have you those monies before us at the same time, wherever we shall then be in England, to render to the said R. for his damages aforesaid, whereof the said T. is convicted; and have there this writ. Witness William earl Mansfield at Westminster, the twenty-third day of October, in the sixth year of our reign.

Writ of possession on a judgment by bill in the court of King's Bench; with a ca' sa' for the damages.

TO the sheriff of *Suffolk*, greeting: Whereas *A. P.* esquire, lately in our court before us, by bill without our writ, and by the judgment of the same court, recovered against *R. H.* gentleman, his term, yet unexpired, of and in a messuage or tenement called *B.* with the appurtenances, in *S.* in your county, and also two hundred acres of land, with the appurtenances, in *S.* aforesaid, which *I. T.* and *W. P.* on the sixth day of *September*, in the fourth year of our reign, demised to the said *A.* for a term of years which is not yet past; that is to say, from the Feast of *Saint Michael* the Archangel, in the said fourth year of our reign, to the full end and term of five years, from thence next ensuing, and fully to be complete and ended; he the said *R.* afterwards, that is to say, on the twenty-eighth day of *October*, in the fifth year of our reign, entered, with force and arms, into the messuage and tenements aforesaid, with the appurtenances, and expelled and ejected the said *A.* therefrom: therefore we command you, that, without delay, you cause the said *A.* to have his possession, yet unexpired, of and in the messuage or tenement above specified; and in what manner you shall execute this our writ, do you make appear to us at *Westminster*, on *Wednesday* next after the morrow of *Saint Martin*, the likewise command you, that you take the said *R. H.* if he be found in your bailiwick, and safely keep him, so that you bring his body before us, at *Westminster*, at the day aforesaid, to make satisfaction to the said *A.* for five pounds ten shillings, his damages which he has sustained, as well by reason of the dispossession and ejectment aforesaid, as for his expences laid out by him about his suit in this cause; whereof the said *R.* is convicted, as it appears to us on record; and have there this writ executed, &c.

Writ of possession upon a judgment in ejectment in the Common Pleas, removed into the court of King's Bench by a writ of error, and there affirmed.

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c. To the sheriff of *Middlesex*, greeting: Whereas *Richard Williamson* lately in our court, before *Mr Charles Pratt*, knight, and his brethren, our justices of our court of *Common Pleas*, by our writ, and by the judgment of the same court, recovered against *William Norton*, late of *London*, yeoman, his term, yet unexpired, of and in eight messuages, with the appurtenances,

in the parishes of *Saint Martin in the Fields*, and *Saint Clement Danes*, in your county, which *Christopher Gnatford*, gentleman, on the first day of *May*, in the third year of our reign, demised to the said *Richard*; to have and to hold to him and his assigns from the twenty-fifth day of *December* then last past, to the full end and term of seven years, from thence next ensuing, and fully to be complete and ended. And whereupon the said *William* afterwards, that is to say, on the twenty-first day of *January*, in the third year aforesaid, with force and arms, entered into the tenements aforesaid, with the appurtenances, and expelled and removed the said *R.* from his possession thereof, and ejected him from his said farm therein; whereof the said *William* is convicted, as by the inspection of the said record and proceedings thereof, which we lately caused to be brought in our court before us, by virtue of our writ for correcting errors prosecuted by the said *William*, of and upon the said promises, now remaining in our court before us, it appeareth to be on record; whereupon the said judgment is before us affirmed, as it likewise appeareth to us on record: and therefore we command you, that without delay you cause the said *Richard* to have his possession of his term aforesaid, yet unexpired, and in the tenements aforesaid; and in what manner you shall execute this our writ, do you make appear to us on the octave of the Purification of the Blessed Virgin *Mary*, where ever we shall then be in *England*; and have there this our witness *William earl Mansfield*, at *Westminster*, on the twentieth day of *November*, in the fifth year of our reign.

Tarde returned upon the writ of possession, and the writ of inquiry executed, and another writ of possession awarded.

AT which day comes here the said *L.* by his attorney as aforesaid, and the sheriff (that is to say) *R. S.* knight, returns, that as to the aforesaid writ to cause the said *L.* to have possession, &c. the same writ was delivered so late to the said sheriff, that for the shortness of the time he could not proceed to the execution thereof; and as to the said writ of inquiry for damages, &c. the said sheriff doth return here a certain inquisition taken at *E.* in the county aforesaid, on the eleventh day of *November* last past, by the oath of twelve, &c. whereby it is found that the said *L.* hath sustained damages, by occasion of trespass and ejectment aforesaid, besides his costs, &c. to the sum of eight shillings, and for those costs, &c. to sixpence. Therefore we have adjudged that the said *L.* do recover against the said *R.* damages aforesaid to forty shillings, found by the said inquisition in the manner aforesaid; and also six pounds nineteen shillings and sixpence, adjudged to the said *L.* at his request, which damages in the whole amount to eight pounds: And

the said *L.* taken, &c. And hereupon the said *L.* as before, prays the writ of our sovereign lord the king, to be directed to the sheriff of the county aforesaid, to cause the said *L.* to have possession, &c.

As to the writ of possession, the sheriff returneth that nothing was done thereupon; and as to the writ of inquiry for damages, the same executed, and another writ of possession awarded.

AT which day comes here the said *T. P.* by his attorney aforesaid. And as to the said writ, to cause the said *T.* to have possession, &c. the sheriff did nothing thereupon, nor returned the writ. Therefore, as before, let another writ be thereof made, directed to him in the manner aforesaid, &c. returnable here on the octave of *Saint Hilary*, &c. And as to the aforesaid writ to enquire of the damages, &c. the sheriff, that is to say, *A. B.* doth now return here a certain inquisition (as in other cases), and for those costs and charges to six shillings; and because the justices will advise themselves, of and upon the premises, until the octave of *Saint Hilary*, before they give their judgment, &c. At which day cometh here the said *T.* by his attorney aforesaid, and hereupon the premises being seen, and by the said justices here fully understood, it is adjudged, &c. (as in the former.) And as to the said writ to cause the said *T.* to have possession, &c. the sheriff, on the said octave of *Saint Hilary*, had done nothing thereupon, nor returned his writ; therefore, as before, let another writ thereof be made in the manner aforesaid, returnable here, &c.

The sheriff returneth that he hath delivered possession, and an inquisition for the damages, and the court will advise before they pronounce judgment for the damages.

AT which day here cometh the said plaintiff, by his attorney aforesaid. And as to the writ to cause the said plaintiff to have possession, &c. the sheriff, that is to say, *G. S.* esquire, now returns, that he, by virtue of the writ aforesaid, to him directed, did, on the twenty-first day of *November* last past, cause the said plaintiff to have his possession of his term aforesaid, yet unexpired, of and in the tenements aforesaid, with the appurtenances, according to the purport of the writ aforesaid; and as to the said writ to enquire of the damages, &c. the said sheriff doth also return here a certain inquisition (as in other cases, until) for those costs and charges to fourpence. And because the justices here will advise, of and upon the premises, as to that particular whereof the said writ of enquiry

enquiry of damages did issue, before they pronounce their judgment thereupon; a day is given to the said plaintiff, as in other cases.

The sheriff returneth, that possession was delivered by his predecessor, and a tarde as to the writ of inquiry.

AT which day here cometh the said *W.* by his attorney aforesaid. And the sheriff, to wit, *W. G.* esquire, now returns here, that *W. B.* esquire, late sheriff of the county aforesaid, predecessor to the said now sheriff, as to the said writ to cause the said *W.* to have possession, &c. did, by virtue of the said writ, to him directed, on the eighth day of *March* last past, cause the said *W. H.* to have his possession, of and in the tenements and passage aforesaid, with the appurtenances, yet unexpired; and as to the writ of enquiry of damages, &c. that writ was so late delivered to him, that for the shortness of time he could not execute the same; which said writ was by the said late sheriff, on his going out of his office, delivered to the said now sheriff, together with the return of the same, executed as aforesaid, &c.

No. X.

Assignment of errors in the King's Bench in a judgment of judgment in the Common Pleas.

AFTERWARDS, that is to say, on *Wednesday* next after five weeks from the Feast day of *Easter* in this said Term; the said *James Chapman Fuller*, by *Joseph Sherwood*, his attorney, appears before our sovereign lord the king, at *Westminster*, and pleads, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this respect; that is to say, that it appears by the record aforesaid, that the said judgment given in the manner aforesaid, was given for the said *R. H.* against the said *I. C. F.* whereas by the law of this kingdom of *Great Britain* the said judgment ought to have been given for the said *I. C. F.* against the said *R.* and therefore it is manifestly erroneous in this respect; and the said *I. C. F.* prays a writ of our sovereign lord the king, to summon the said *R.* to be before our said sovereign lord the king, to hear the record and proceedings aforesaid; and it is granted to him, &c. By which the sheriff is commanded, that by honest, &c. he make known to the said *Robert*, that he be before our said sovereign lord the king, on the morrow of the *Holy Trinity*, wheresoever, &c. to hear the record and proceedings aforesaid; and further, &c. The same day is given to the said *I. C. F.* &c. At which day the said *I. C. F.* by his attorney aforesaid, app

Prayer of
sci. fa. ad
audiendum
errores.
Sci. fa. ac-
cordingly,

appears before our sovereign lord the king, &c. and the sheriff *Vic. non mis.*
 returned not the writ thereupon. And the said *R.* at the same *breve.*
 day, by *Nathan Hickman*, his attorney, likewise comes here
 into this court *gratis*; whereupon the said *I. C. F.* pleads, that
 in the record and proceedings aforesaid, and also in giving the
 judgment aforesaid, there is manifest error, alledging the error
 aforesaid by him before alledged in the manner aforesaid; and
 prays that the judgment aforesaid, for that and other errors in
 the record and proceedings aforesaid; may be reversed, an-
 nulled, and rendered altogether ineffectual, and that he may
 be restored to all things which he hath been deprived of, by
 reason of the judgment aforesaid; and that the said *Robert*
 may join to the errors aforesaid; and that the court of our said
 sovereign lord the king may now here proceed to an exami-
 nation, as well of the record and proceedings aforesaid, as of
 the matters above assigned for error as aforesaid. And there-
 upon the said *Robert* doth aver, that neither in the record and Joinder in
 proceedings aforesaid, nor in giving the judgment aforesaid, is error.
 there any error whatsoever. And he likewise prays, that the
 court of our said sovereign lord the king may now here pro-
 ceed to an examination, as well of the record and proceedings
 aforesaid, as also of the matters aforesaid above assigned for
 error as aforesaid; and that the said judgment may be in all
 things affirmed, &c.

Copy of an assignment of errors in the Exchequer Chamber, and
 of the judgment thereon; as also of the remission of the record
 back again into the court of King's Bench.

AFTERWARDS, that is to say, on Saturday the fifteenth day
 of January, in the nineteenth year of the reign of our
 sovereign lord the king that now is, the transcript of the
 record and proceedings aforesaid, between the said parties, to-
 gether with all things touching the same, by means of a writ
 of our sovereign lord the king, for correcting errors in the
 remises, sued out by the said *Francis Gerrard*, were transmitted
 to the justices of the Common Bench of our said sovereign lord
 the king, and the barons of the Exchequer of our said sove-
 reign lord the king, into the Exchequer Chamber aforesaid (ac-
 cording to the form of the statute made in the parliament of
 the late sovereign lady *Elizabeth* late queen of England, at *West-*
minster, on the twenty-third day of November, in the twenty-
 seventh year of her reign), from the said court of our said
 sovereign lord the king, before the king himself. And the
 said *Francis*, in the same Exchequer Chamber, assigned divers
 matters in the record and proceedings aforesaid, to reversing
 and annulling the said judgment: To which the said *Gideon*
 appearing in the same court, pleaded that there is no error
 what-

whatsoever, either in the record and proceedings aforesaid, or in giving the judgment aforesaid. And afterwards, that is to say, on *Saturday* the sixth day of *February*, in the twenty-first year of the reign of our sovereign lord the king that now is, as well the said *Gideon Cook* as also the said *Francis Gerrard*, by their attornies aforesaid, came before the said justices of the *Common Bench* of our said sovereign lord the king, and the barons of the *Exchequer* of our said sovereign lord the king, in the said court of the *Exchequer Chamber* aforesaid. Whereupon all and singular the premises being viewed, diligently examined, and fully understood, by the court of our said sovereign lord the king, in the said *Exchequer Chamber*; on mature deliberation had thereon, it was adjudged, that the judgment aforesaid is in no wise vicious or defective, and that there is no error in the record or proceedings aforesaid. Therefore it was adjudged, that the said judgment should be in all things affirmed, and remain in its full force and effect, the said cause above assigned for error to the contrary in any wise notwithstanding. And it was then and there further adjudged, that the said *Gideon Cook* should recover against the said *Francis Gerrard*, — pounds, awarded by the court of our said sovereign lord the king, in the court of the *Exchequer Chamber* as aforesaid, to the said *Gideon*, with his consent, according to the form of the statute in such case made and provided, for his damages and costs which he sustained by reason of delaying the execution of the judgment aforesaid, by means of suing out and prosecuting the said writ of error. And thereupon the record aforesaid, and also the proceedings in the premises had thereupon, before the justices and barons aforesaid, were remitted before our said sovereign lord the king, wheresoever, &c. by the justices and barons aforesaid, according to the form of the statute, &c. and they now remain here in the said court of our said sovereign lord the king.

Cooté v. Linch,

Writ of error upon a bill of exceptions, on a verdict, and judgment in the Common Pleas in Ireland, removed into the King's Bench there, and affirmed; and from thence removed to

WILLIAM the third, by the grace of God, &c. To our trusty and well beloved countellor, sir *Richard Pyne* knight our chief justice, assigned to hold pleas before us in our kingdom of *Ireland*, greeting: Because in the record and proceedings, and also in giving judgment, of a plaint, which was levied in our court of *Common Pleas* in our kingdom of *Ireland*, before you and your brethren, then our justices of the same court, by our writ, between *John Lynch* gentleman and *Richard Coole* &c. quire, of a plea of trespass and ejectment, done to the said *John* by him the said *Richard*; which said record and proceedings, with the cause of the intervening error, we have caused to be brought before us in our kingdom of *Ireland*, and the judge

ment thereupon is affirmed before us in our kingdom of *Ireland*, the King's Bench in England, and there affirmed; and afterwards removed into the House of Lords. Lil. Entr. 273, Carth. 460. 5. Mod. 423, Salk. 327, S. C.

and now remaining before us in our said kingdom of *Ireland*; manifest error intervened, to the great damage of the said *Richard*, as we have received information from his complaint: we, willing the error, if any, be in a due manner corrected, and full and speedy justice done to the said parties in this particular, command you, that if judgment be thereupon given, and affirmed, then do you certify under your seal, the record and proceedings aforesaid, distinctly and plainly, together with all things relating thereto, and this writ, so that we may have them on the octave of the Purification of the Blessed Virgin *Mary*, wherever we shall then be in *England*; that by inspecting the record and proceedings aforesaid, we may cause further to be done therein, what of right ought to be done, for correcting the error therein: and do you make known to the said *John*, that he be there then, to proceed in the plaint aforesaid; and further to do and receive that which our court shall adjudge in the premises. Witness ourself at *Westminster*, on the eighteenth day of *December*, in the seventh year of our reign.

Layton,
Allowed, *Richard Pyne*.

THE record and proceedings of the plaint, whereof mention is within made, with all things touching the same, I certify to our sovereign lord the king, wheresoever, &c. at the day and place within contained, in the record to this writ annexed; and I have made known to the within named *John Lynch*, that he be then there, to proceed in the plaint aforesaid, as I am commanded to do.

The answer of *Richard Pyne*,

Plas before our sovereign lord the king, at the king's court, of Trinity Term, in the seventh year of the reign of our sovereign lord William the third, king of England, Scotland, France, and Ireland, defender of the faith. Witness sir *Richard Pyne*, knight.

Savage.

OUR sovereign lord the king hath sent to his trusty and well-beloved counsellor, sir *Richard Pyne* knight, his writ close in these words, that is to say: *William* the third, by the grace of God, &c. To our trusty and beloved counsellor, sir *Richard Pyne* knight, greeting: Because in the record and proceedings; and also in giving judgment, in a plaint, which was before you and your brethren, our justices of the Common Bench of the kingdom of *Ireland*, by our writ between *John Lynch* plaintiff, and *Richard Coote* esquire defendant,

Writ of error to the Chief Justice of K. B. in Ireland, to examine the record and proceedings there.

defendant, in a plea of trespass and ejectment, manifest error intervened, as it is said, to the great damage of the said Richard, as we have received information from his complaint: we willing the error, if any there is, be in a due manner corrected, and full and speedy justice done to the parties aforesaid, in this particular, command you, that if judgment hath been thereupon given, then send you under your seal, distinctly and plainly, the record and proceedings aforesaid, together with all things touching the same, and this writ, so that we may have them before us, on the octave of the Purification of the Blessed Virgin Mary, wheresoever we shall then be in Ireland; that inspecting the record and proceedings aforesaid, we may cause further to be done, for correcting the errors therein, what of right, and according to the customs of our kingdom of Ireland ought to be done. Witness our trusty and well beloved counsellor, Henry lord baron Capel of *Trankbury*, sir *Cyrill Wyche* knight, and *William Duncombe* esq; our justices and general governors of our kingdom of Ireland, at the King's Court, on the first day of February, in the seventh year of our reign.

Carr and Carr.

Return of the writ of error.

BY virtue of this writ, to me directed, I humbly certify to our sovereign lord the king, the record and proceedings of the plaint, whereof mention is within made, together with all things touching the same, as this writ doth direct and require.

Richard Pyne.

Pleas at the king's courts, before sir Richard Pyne knight, and his brethren, justices of our sovereign lord and lady William and Mary, king and queen of England, Scotland, France, and Ireland, defenders of the faith, of their bench, of the kingdom of Ireland, of Hilary Term, in the fifth year of their reign.

Walker.

Declaration in ejectment in the Common Pleas in Ireland, of a castle, manor, &c.

RICHARD COOTE esquire was attached to answer to *John Lynch* gentleman, of a plea wherefore, with force and arms, he broke and entered into the castle, manor, and vill, of *Gormanstowne*; and two hundred messuages, two hundred cottages, two hundred gardens, one hundred orchards, three windmills, three fulling mills, one thousand acres of land, one thousand acres of meadow, one thousand acres of pasture, and one thousand acres of furze and heath, with the appurtenances, in the vills and land of *Gormanstowne*, *Garrywestowne*, *Richardstowne*, *Baltray*, *Leogdeory*, *Balloo*, *Stamulni*, and *Caddellstowne*; and all and singular which premises lie in the barony of *Duleek* and

and county aforesaid, which *Jenico Preston* gentleman, commonly called *Jenico* viscount *Gormanstowne*, demised to the said plaintiff, *John Lynch*, for a term which is not yet past, and ejected the said *John Lynch* from his farm aforesaid, his term aforesaid therein being not yet expired; and did him other wrongs, to the great damage, &c. and against the peace, &c. And whereupon the said *John Lynch*, by *Michael Hall* his attorney, complains, that whereas the said *Jenico Preston* on the first day of *May*, in the year of Our Lord 1693, at *Gormanstowne* in the county aforesaid, demised and to farm let to the said *John Lynch*, the castle, manor, and vill, of *Gormanstowne*; and two hundred messuages, two hundred cottages, two hundred gardens, one hundred orchards, three windmills, three fulling-mills, one thousand acres of land, one thousand acres of meadow, one thousand acres of pasture, and one thousand acres of furze and heath, with the appurtenances, in the vills and land of *Gormanstowne*, *Carrowstowne*, *Richardsstowne* *Boltray*, *Leegbury*, *Bailoy*, *Stamulsi*, and *Caddellstowne*; all and singular which premises lie in the barony of *Dulceke* and county aforesaid, to have and to hold all and singular the demised premises, to the said *John Lynch*, his executors, administrators, and assigns, for the term of twenty-one years, thence next following; by virtue of which said demise, the said *John Lynch* on the second day of the month of *May* aforesaid, in the year of Our Lord 1693, entered into the said demised premises, with the appurtenances, and was possessed thereof: and being so possessed thereof, he the said *R. C.* on the third day of *May*, in the year aforesaid, with force and arms, entered into the said demised premises, in and upon the possession thereof of the said *John Lynch*, and with force and arms ejected, expelled and removed the said *John* from his farm aforesaid (his term aforesaid therein being unexpired), and did and now doth withhold the said *John* from his farm aforesaid, being so expelled therefrom; and then and there did him other injuries, against the peace of our sovereign lord and lady the now king and queen, and to the great damage of the said *John*; whereupon he declares he is injured and endamaged to the value of four thousand pounds sterling, and therefore he brings his suit, &c. And the said *R. by R. P.* his attorney Not guilty. Comes and defends the force and injury, when, &c. and saith, that he is in no wise guilty of the premises above charged upon him, in such manner and form as the said *John* complains against him; and thereof he puts himself upon the country, and the said *John* doth likewise the same; therefore the sheriff commanded, that he cause to come here in fifteen days from after-day, twelve, &c. by whom, &c. and who neither, &c. recognize, &c. because as well, &c. the same day is given to the said parties to be here, &c. Afterwards, the process being thereupon continued between the parties aforesaid, the *Jurata* are thereupon respited in the said action here, unto this day,

Demise of the
queen.

Verdict at bar
for the plain-
tiff.

Judgment.

day, (that is to say) in fifteen days from the day of *St. Hilary*, then next following; before which day our said sovereign lady *Mary*, late queen of *England*, departed this life; after whose decease (that is to say) in fifteen days of *St. Hilary*, as well the said *I. L.* gentleman, as the said *R. C.* esq; by their attorneys aforesaid, appear; and the jury thereupon impanelled, being called likewise appear; who being elected, tried, and sworn to declare the truth of the premises, do upon their oath declare, that the said *R. C.* is guilty of the trespass and ejectment aforesaid in such manner and form as the said *I. L.* declares against him; and they do assess the damages of the said *John*, occasioned by the trespass and ejectment aforesaid, besides his expences and costs, laid out by him about his suit in this cause, to twelvepence sterling, and for those expences and costs to sixpence. Therefore it is adjudged, that the said *I. L.* gentleman, do recover against the said *R. C.* his term aforesaid, yet to come, of and in the said premises, with the appurtenances, and his damages aforesaid, assessed by the said jury to eighteenpence, in the manner aforesaid; and also thirty-six pounds six shillings and ninepence, adjudged by this court to the said *I. L.* with his consent for his expences and costs aforesaid, by way of increase: which said damages in the whole amount to thirty-six pounds eight shillings and threepence; and be the said *R. C.* &c. taken, &c.

Examined by *Walker*.

*Scire faciās
quare execu-
tionem non.*

Return of
nihil.

AFTERWARDS (that is to say) on *Friday* next after the morrow of the *Holy Trinity*, in this same Term, the said *I. L.* by *Charles Redman* his attorney, appears before our sovereign lord the king, at the king's court; and the said *John* prays a writ of our sovereign lord the king, to summon the said *R. C.* to be before our said sovereign lord the king, to shew if he hath or knows of any thing to say for himself; why the said *I. L.* ought not to have his execution against him; of and upon the judgment aforesaid; and it is granted to him, &c. by which the sheriff of the county aforesaid is commanded, that by honest men, &c. he make known to the said *R. C.* that he be before our sovereign lord the king, on *Tuesday* next after the morrow of the *Holy Trinity*, wheresoever, &c. to shew cause in the manner aforesaid, if, &c. and further, &c. the same day is given to the said *John* to be there, &c. At which day the said *I. L.* appears before our sovereign lord the king, at the king's court, by his attorney aforesaid, and offers himself on the fourth day of the plea, against the said *R. C.* in the said action; and he, being solemnly called, appears not, and the sheriff doth now return here, that the said *R. C.* hath nothing, &c. nor is he to be found, &c. therefore the sheriff of the said county is as before commanded, that by honest men, &c. he make it known to the

said R. C. that he be before our said sovereign lord the king, at *Alias feire*
 the king's court, on *Wednesday* next after the morrow of *All-facias*.
saids, wheresoever, &c. to shew cause in the manner aforesaid,
 if, &c. the same day is given to the said I. L. &c. At which day
 as well the said I. L. by his said attorney, as also the said R. C.
 by L. M. his said attorney, appear before our sovereign lord the
 king at the king's court, and thereupon the said R. C. brings *Bill of excep-*
 here into this court of our said sovereign lord the king, before *tions.*
 the king himself, a bill of exceptions, with the seal of *Sir Richard*
Pyme, knight, second Justice of our said sovereign lord the king, *Pract. reg.*
 of his *Common Bench* of his kingdom of *Ireland*, and *Sir John* *32.*
Jefferson, knight, one of the Justices of the same court, at the *13. Ed. 1. c. 31.*
 request of the said R. C. thereto affixed, according to the form of *Bull. nisi pri.*
 the statute in such case made and provided, as it is affirmed, *315, &c.*
 desiring it to be here enrolled, and it is granted, &c. which said
 bill follows in these words; that is to say, Be it remembered, that
John Lynch, gentleman, before *Sir Richard Pyme*, knight, and his *Recital of the*
 brethren, Justices of our sovereign lord the king, of his bench in the *record.*
 kingdom of *Ireland*, at the king's courts at *Dublin*, prosecuted a
 plea of trespass and ejectment against *Richard Coote*, esquire, by a
 writ of our said sovereign lord the king and the late queen,
 suggesting by his declaration, upon his writ aforesaid, that *Jenico*
Preston gentleman, commonly called *Jenico* lord viscount *Gor-*
mansfowne, on the first day of *May*, in the year of Our Lord
 1692, at *Gormansfowne* in the county of, &c. had demised and to
 farm let unto the said I. L. the castle, manor, and villis of *Gor-*
mansfowne (so reciting the declaration, as is before mentioned);
 to which said declaration, the said R. C. by R. P. his attorney,
 came into the same court, before the said Justices, and defended
 the force and injury when, &c. and pleaded that he the said
 R. C. was not guilty of the trespass and ejectment aforesaid, and
 thereof he put himself upon the country; and the said I. L. did
 likewise the same. And now here at the trial of the issue aforesaid,
 between the parties aforesaid, R. R. esquire, of counsel with
 the said plaintiff, to maintain the issue aforesaid, on the part of
 the said plaintiff, and to prove the title of the said *Jenico Preston*, *The plaintiff's*
 the lessor of the plaintiff, to the demised premises aforesaid, at *evidence.*
 the time of the demise made as aforesaid, gave in evidence to the
 said jurors, an act of our late sovereign lord *Charles* the second,
 king of *England*, of the parliament of his kingdom of *Ireland*, in
 a parliament of our said sovereign lord king *Charles* the second,
 begun at *Dublin*, in his said kingdom of *Ireland*, on the eighth
 day of *May*, in the thirteenth year of the reign of our said late
 sovereign lord king *Charles* the second, and there continued by
 several prorogations, until the twenty-sixth day of *October*, in
 the seventeenth year of the reign of the same king; intitled,
 An act, &c. By which said act of parliament it is enacted, that
 &c. He also gave in evidence, that the said *Jenico* viscount *Gor-*
mansfowne, after making the said indenture, that is to say, on the
 eighteenth day of *October*, in the year of Our Lord 1690, died,
 without

without issue male begotten of his body; and that the said *Jenico*, the lessor of the now plaintiff, and *Jenico Preston*, the eldest son of *Nicolas Preston*, brother of *Jenico Preston*, late viscount *Gormanstown*, mentioned in the indenture of lease aforesaid, is one and the same, and not different persons; and that the said *Jenico Preston*, the lessor of the now plaintiff, demised the premises aforesaid to the said *John Lynch*, in such manner and form as is expressed in the declaration aforesaid; and that the said *John Lynch*, by virtue of the demise aforesaid, entered and was thereof possessed, until the said *Richard Coote* ejected him, in such manner and form as the said *John Lynch* above complains against him.

The defend-
ant's evi-
dence.

Nehemiah Donnelland, esquire, prime serjeant at law of our sovereign lord the king, offered to prove and give in evidence to the said jurors, on the part of the said *R. C.* that the said *Jenico* had no seisin, interest, or title, in or to the said vills, lands, and tenements, and that he could not recover the possession mentioned in the declaration aforesaid, in such manner and form as the said *Jenico* proposed by his said suit; and that the said *Richard* was not guilty of the trespass and ejectment aforesaid, and that all and singular the vills, lands, and tenements aforesaid, mentioned in the declaration, were seised and sequestered into the hands, and to the use of *Charles* the first, late king of *England*, after the twenty-third day of *October*, in the year of Our Lord 1641. And the said *N. Donnelland*, on the part of the said defendant, produced and gave in evidence to the said jurors, that it is further provided by the said act, that, &c. And the said *N. Donnelland* further offered, and would have proved in evidence to the said jurors, that the lands, tenements, and premises, mentioned in the declaration aforesaid, were in the seisin of the said *R. C.* at the time of making the said act, as assignee of the said earl of *Mountrath*, being the son of the said earl; and the lands aforesaid being duly assigned and limited, to him and his heirs, according to the true intent of the said act; and that the said lands in the declaration were the lands of the said viscount *Gormanstown*, and by the said clause or provision to be restored to him, after a reprisal made to the said *Richard*; and that the said lands and tenements do, and at the time of making the said act of explanation did, contain one thousand four hundred acres of land; and that no other forfeited lands were assigned to the said *Richard*, as assignee to the said earl, or to any other person, the heirs or assigns of the said earl, in satisfaction thereof, except lands containing one thousand and one hundred acres, and no more; and that no satisfaction was made for the rents and profits of the said lands, received by the said lord viscount *Gormanstown*, named in the said act, or by his agents, after the entry upon the premises, made by him as aforesaid; and for these reasons, and until the full number of one thousand four hundred acres be assigned to the said *Richard*, in satisfaction of the said one thousand four hundred acres, mentioned in the said declaration.

declaration, and until satisfaction be made to him for the rents and profits of the premises aforesaid, according to the true intention of the said act, the said viscount, or his assigns, ought not to be restored to the tenements aforesaid, mentioned in the declaration aforesaid. And the said *N. Donnelland* further shewed and gave in evidence, to the said jurors, that the said *Jenico*, late viscount *Gormanston*, was restored by the said act, but was attainted of high treason, committed against our sovereign lord the king that now is, and our late sovereign lady the queen, that is to say, on the tenth day of *April*, in the third year of their reign; by virtue whereof, all his lands and tenements were forfeited to the said king and queen, without any office or inquisition to be found thereof, according to the form of the statute in such case made and provided; and by reason thereof were seized into the hands of our said sovereign lord the king that now is, and of our sovereign lady the late queen; whereby the said *Jenico*, mentioned in the said declaration, could obtain no possession or seisin by his entry, because the hands of our said sovereign lord the king that now is, and our said sovereign lady the queen, were not from thence removed; so that, for that reason, the demise of the premises aforesaid, supposed to be made to the said *John Lynch*, was invalid and of no effect; and he further shewed and gave in evidence to the said jurors, that an instrument, produced in writing on the part of the plaintiff, importing an inrollment, in the exchequer, of an order made by the said commissioners, for the execution of the said act of parliament, to wit, an order bearing date on the first day of *January*, in the year of Our Lord 1663, shewn in evidence to the said jurors, by *Robert Rochford*, esquire, of counsel for the plaintiff, ought not to have been given in evidence to the said jurors, without proof, upon the oath of witnesses, that the said order was signed and sealed by the said commissioners; because it was not of record, nor was any order of itself a record; and the said *N. D.* desired the said justices before whom the trial was of the issue aforesaid, to inform the said jurors, and declare to them the law, of and concerning the premises; and that the demise aforesaid, made to the plaintiff, was invalid for the reason aforesaid; and that the said *Jenico Preston* ought not to be restored to the premises, for the impediment and reasons aforesaid, which, according to the form and effect of the said statute, ought to be removed before he should be restored; but the said justices affirmed to the said jurors, that the matter shewn by the said *N. D.* in manner and form aforesaid, was of no effect to preclude the said *Jenico*, or the said plaintiff, from having or maintaining the said action; whereupon the said *N. D.* inasmuch as the matter aforesaid shewn by him, and produced and given in evidence to the said jurors, would in no wise appear by the verdict of the said jurors, requested the said justices, according to the form of the statute in such case made and provided, to send

The evidence in dispute.

Reference to the Judges.

Their determination.

Prayer of a bill of exceptions.

Scire Facias
to the Justices
to acknow-
ledge or deny
their seals.

The Justices
appear, and
acknowledge
their seals.

Writ of error
to the king's
bench in Ire-
land.

this present bill of exceptions, which contains in itself the matters
aforesaid, shewn by the said *N.* in evidence to the said jurors, in
the manner and form aforesaid; which said justices, at the re-
quest of the said *N.* according to the form of the statute in such
case made and provided, sealed this present bill, at the king's
court aforesaid, on the fourth day of *February*, in the year of
Our Lord 1694. *R. Cox, J. Jefferson.* And the said *Richard*
Coote prays a writ of our sovereign lord the king, to summon the
said *Sir Richard Cox*, knight, and *Sir John Jefferson*, knight, the
justices aforesaid, that they be before our said sovereign lord the
king, wheresoever, &c. and it is granted to them, &c. by which
the said justices are commanded, that they be before our sove-
reign lord the king, on *Saturday* next, after the morrow of *Saint*
Martin, wheresoever, &c. to deny or acknowledge the bill of
exceptions, asserted to have been sealed by them as aforesaid
according to the form and effect of the statute, &c. At which
day the said *Richard Cox* and *John Jefferson* personally appear
before our said sovereign lord the king, at the king's court, and
acknowledge the seals, asserted to have been put to the said bill
of exceptions, to be the seals of the said *Richard Cox* and *John*
Jefferson. And thereupon the said *Richard Coote* brings into the
court of our said sovereign lord the king, before the king him-
self, another writ of error, in the premises, directed to *Sir Richard*
Reynell, knight and baronet, chief justice of our said sovereign
lord the king, in these words, that is to say, *William* the third
by the grace of God, &c. to our trusty and well-beloved coun-
sellor, *Sir Richard Reynell*, knight and baronet, our Chief Justice
assigned to hold pleas before us in our kingdom of *Ireland*, and
his brethren our justices there, greeting: Forasmuch as in the
record and proceedings, on a plaint which was levied in the
court of *Common Bench*, of us and of the lady *Mary* our late queen
before our trusty and beloved counsellor, *Sir Richard Pym*,
knight, our chief justice of the same *Bench*; and also in giving
judgment on the same plaint, which was given in our court of
Common Bench, between *John Lynch*, gentleman, plaintiff, and
Richard Coote, esquire, defendant, of a plea of trespass and eje-
ment, manifest error intervened, as it is alledged, to the great
damage of the said *Richard*, as we have received information
from his complaint; we command you, that you, inspecting the
record and proceedings aforesaid, cause further to be done for
correcting the errors therein, what of right, and according to
the law and customs of our kingdom of *Ireland*, ought to be done.
Witness our faithful and well-beloved counsellor, *Henry* lord
baron *Capell of Tewksbury*, deputed our general governor of our
kingdom of *Ireland*, at the king's court, on the thirty-first day
of *May*, in the seventh year of our reign.

Carr and Carr, by *Carr*
Allowed, *R. Reynolds*

And thereupon the said *Richard Coote*, by his attorney afore- Assignment of
 said, comes and pleads, that in the record and proceedings afore- errors in Ire-
 said, and also in giving judgment as aforesaid, there is manifest land.
 error in this respect, that is to say, that by the record and pro-
 ceedings aforesaid it doth appear, that the judgment, given in
 the plea aforesaid, was given for the said *John Lynch* against the
 said *Richard Coote*, whereas by the law of the land of this king-
 dom of Ireland, judgment ought to have been given for the said
Richard Coote against the said *John Lynch*, by reason of which,
 and other errors being in the record and proceedings aforesaid,
 the said *Richard Coote* prays that the said judgment be re-
 versed, annulled, and rendered ineffectual, &c. and that he
 may be restored to all things which he hath been deprived of by
 reason of the judgment aforesaid. At which *Saturday* after the
 morrow of *Saint Martin*, as well the said *Richard* as the said *John*,
 by their attornies aforesaid, appear before our said sovereign
 lord the king, whereupon the said *Richard* as before avers, that
 the record and proceedings aforesaid, and also in giving
 judgment as aforesaid, manifest error intervened, alledging the
 error aforesaid above assigned by the said *Richard* in manner
 aforesaid, and prays that the judgment aforesaid, for that and
 other errors being in the record and proceedings aforesaid, may
 be reversed, annulled, and rendered altogether ineffectual; and
 that he may be restored to all things which he hath been de-
 prived of by reason of the judgment aforesaid; and that the said
 do rejoin to the errors aforesaid; and that the court of our
 said sovereign lord the king may now here proceed to an exa-
 mination, as well of the record and proceedings aforesaid, as of
 the said matter above assigned for error. And the said *John*
 avers, that neither in the record and proceedings aforesaid,
 in giving judgment as aforesaid, is there any error whatso- Joinder in
 er; and he likewise prays, that the court of our said sovereign error.
 lord the king may proceed to an examination, as well of the
 record and proceedings aforesaid, as of the said matter above
 assigned for error; and that the judgment aforesaid may be in
 respects affirmed: and because the court of our said sovereign
 lord the king is not yet advised, what judgment to give of and
 on the premises, a day is therefore given to the parties afore-
 said, to be before our said sovereign lord the king, till the octave
 of *Saint Hilary*, wheresoever he shall then be in *Ireland*, to hear
 judgment of and upon the premises, for that the court of
 our said sovereign lord the king are not yet advised thereof.
 At which day the said parties, by their said attornies, came
 before our said sovereign lord the king, at the king's court;
 whereupon, the premises being viewed, and by the court of our
 said sovereign lord the king fully understood, and upon diligent
 examination as well of the record and proceedings aforesaid,
 as the judgment thereupon, as also of the said causes above
 assigned for error by the said *Richard Coote*, and upon mature
 consideration thereupon had, it appears to the court of our said
 sovereign

Judgment
affirmed.

sovereign lord the king, that there is no error in the record therefore it is adjudged, that the said judgment be in all respects affirmed, and that it remain in full force and effect, the said cause and matters, above assigned for error; in anywise notwithstanding. And it is further adjudged, that he the said *J. L.* do recover again st the said *R. C.* eighteen pounds sixteen shillings sterling, for his damages and costs, which he has sustained by reason of delaying the execution of the judgment aforesaid, by means of prosecuting the said writ of error in the premises; and that the said *J. L.* have his execution thereof, &c.

Assignment
of errors in
England.

Afterwards, that is to say, on *Friday* next after the morrow of *Saint Martin*, in this same Term, the said *R. C.* appears before our said sovereign lord the king at *Westminster*, by *John Lilly* his attorney, and declares that in the record and proceedings aforesaid, and also in giving judgment aforesaid, and moreover the affirmance thereof there is manifest error in this respect, that is to say; that by the record of the judgment aforesaid, as the affirmance thereof, it doth appear, that the judgment aforesaid was given, and affirmed in the manner aforesaid, for the said *John Lynch* against the said *Richard Coote*, whereas by the law of the land of the said kingdom of *Ireland*, judgment ought to have been given for the said *Richard Coote* against the said *John Lynch*; therefore it is manifestly erroneous in that respect; and this the said *Richard* is ready to verify; wherefore he prays that the said judgment and the affirmance thereof, for thole and other errors being in the record and proceedings aforesaid, be reversed, annulled, and rendered altogether ineffectual; and that he the said *R. C.* be restored to all things which he hath been deprived by reason of the judgment aforesaid, and the affirmance thereof; and that the said *John* may rejoin to those errors. And the said *John*, by *Jonatban Bolt* his attorney, comes gratis here into court, and having awarded the errors aforesaid, he forthwith pleads that neither in the record and proceedings aforesaid, or in giving the judgment aforesaid, or in the affirmance thereof, is there any error whatsoever, and prays that the court of our said sovereign lord the king may proceed to an examination, as well of the record and proceedings aforesaid, as also of the matter above assigned for error; and that the said judgment be in all things affirmed; and because the court, &c.

Joinder in
error.

Writ of error
in parliament.

WILLIAM the third, by the grace of God, &c. To our trusty and beloved sir *John Holt* knight, our Chief Justice assigned to hold pleas before us, greeting: Because in the record and proceedings of a certain plaint, which was levied in our late queen *Mary's* court of *Common Bench* of the kingdom of *Ireland*, before sir *Richard Pyne* knight and his brethren our and our said late queen's Chief Justice of the same court, our writ, and also in giving judgment of the said plaint, was

was given in our court of *Common Bench* aforesaid, between *John Lynch* gentleman, and *Richard Coote* esquire, in a plea of trespass and ejectment, done to the said *John* by the said *Richard*; which said record and proceedings, with the causes of error, we caused to be brought before us in our said kingdom of *Ireland*, and the judgment was thereupon affirmed in our kingdom of *Ireland*; and we thereupon caused the said record and proceedings, with the cause of the error intervening therein, to be brought before us in *England*, and the judgment is thereupon affirmed before us in *England*; manifest error intervened, as it is said, to the great damage of the said *Richard*, as we have received information from his complaint: We, willing that the error, if any there is, be duly corrected, and full and speedy justice done to the parties aforesaid, command you, that if the judgment in the *Common Pleas* of our kingdom of *Ireland*, and in our court before us in *England*, be affirmed, then do you without delay, plainly and distinctly, certify the record and proceedings aforesaid, together with all things touching the same, to us, in our present parliament; that we, inspecting the record and proceedings aforesaid, with the consent of the lords spiritual and temporal, in parliament assembled, for correcting those errors, may further cause to be done, what of right, and according to the law and customs of this our kingdom of *England*, ought to be done. Witness ourself at *Westminster*, on the twentieth day of *January*, in the ninth year of our reign.

S. Terry.

The answer of sir *John Holt* knight, the Chief Justice within named.

THE record and proceedings of the plait, whereof mention is within made, with all things touching the same, to the lord the king within named in the present parliament, with my proper hands I have produced, in a certain record to this writ annexed, as I am within commanded.

J. Holt.

Plea before our sovereign lord the king, at Westminster, of Michaelmas Term in the eighth year of the reign of our sovereign lord William the third, now king of England, &c. Roll 347.

AT which day the said parties come before our sovereign judgment in lord the king at *Westminster*, by their said attornies, and the King's all and singular the premises being viewed and fully understood Bench. by the court of our said sovereign lord the king now here, and upon diligent examination and inspection, as well of the record and proceedings aforesaid, and the judgment given thereupon, as also of the said causes and matters by the said *Richard Coote* assigned for error, inasmuch as it appears to our said sovereign

M m 3

lord

lord the king, that neither in the record and proceedings aforesaid, nor in giving the judgment aforesaid, is there any error whatsoever, and that the record is in no wise vicious or defective; it is adjudged, that the said judgment be in all respects affirmed, and remain in its full force and effect, the said cause and matters assigned for error in any wise notwithstanding: and it is further adjudged by the court of our said sovereign lord the king, that the said *John Lynch* do recover against the said *Richard Coote*, forty-four pounds, now here adjudged in the said court of our said sovereign lord the king (according to the form of the statute in such case made and provided), to the said *John Lynch*, for his expences, costs and damages, which he hath sustained by reason of delaying the execution of his judgment aforesaid, by means of prosecuting the said writ of error; and that the said *Lynch* have his execution thereupon, &c.

Assignment
of error in
Parliament.

Afterwards, that is to say, on the fourth day of *February*, the tenth year of the reign of *William the third*, now king of *England*, &c. the said *Richard Coote*, by *John Lilly* his attorney comes and pleads, that in the record and proceedings aforesaid, and also in giving judgment as aforesaid, and in the several affirmances of the judgment aforesaid, mentioned in the said record, there is manifest error in this respect; that is to say, doth appear by the said record, that the judgment aforesaid given by the said court of our said sovereign lord the king, before our said sovereign lord the king, at the king's court in the kingdom of *Ireland*, and in all things affirmed in the court of our said sovereign lord the king, before the king himself, whereas no such affirmance of the judgment aforesaid ought to have been given; therefore it is in this respect manifestly erroneous: and he prays that the judgment aforesaid, for that and other errors in the record and proceedings aforesaid, be reversed, annulled, and rendered altogether ineffectual; and that he be restored to all things which he hath been deprived of, by means of the judgments aforesaid; and that the said *John Lynch* rejoin to the errors aforesaid.

Edward Noribey.

And the said *John* saith, that neither in the record and proceedings aforesaid, nor in giving judgment as aforesaid, is there any error whatsoever; and he also prays that this high court of parliament may now here proceed to an examination, as well of the record and proceedings aforesaid, as of the premises above assigned and alledged for error by the said *Richard Coote*, and that the said judgment be in all things affirmed.

Caribew.

No. XI.

Declaration by original for the mesne profits.

Worcestershire, ff. **JOHN DURHAM**, late of *Willersley*, in the *Lil. Entr.*
county of Gloucester, yeoman, was attached 192.

to answer *John Underbill*, of a plea wherefore, with force and arms, he broke and entered three messuages, five hundred acres of land, two hundred acres of meadow, and two hundred acres of pasture, with the appurtenances, in *Treddington*, in the county of *Worcester* aforesaid, and expelled, put out, and removed, the said *John Underbill* from the possession and occupation of his said tenements, and kept and continued the said *John Underbill* so expelled, put out, and removed, from the possession and occupation of the same for a long space of time; and, during all that time, had and received, to his own use, all the rents, issues, and profits of the said tenements, being of the yearly value of two hundred pounds; and other injuries to the said *John Underbill* there did, to the great damage of the said *John Underbill*, and against the peace of our sovereign lord the king, his crown and dignity; and hereupon the said *John Underbill*, by *Giles Taylor* his attorney, complains that the said *John Durham*, on the first day of *June*, in the fifth year of the reign of his present majesty, with force and arms, broke and entered the said three messuages, five hundred acres of land, two hundred acres of meadow, and two hundred acres of pasture, with the appurtenances, in *Treddington* aforesaid, in the said county of *Worcester*, and expelled, put out, and removed the said *John Underbill* from the possession and occupation of his said tenements, and kept and continued the said *John Underbill* so expelled, put out, and removed, from the possession and occupation of the same, for a long space of time; that is to say, from the said first day of *June*, in the tenth year aforesaid, until the day of suing out the original writ of the said *John Underbill*; and, during all that time, had and received, to his own use, all the rents, issues, and profits, of the said tenements, being of the yearly value of two hundred pounds; and other injuries to the said *John Underbill* then and there did, to the great damage of the said *John Underbill*, and against the peace of our said sovereign lord the king, his crown and dignity: wherefore the said *John Underbill* says that he is injured, and hath sustained damage to the value of fifty pounds; and therefore he brings his suit, &c.

Declaration, by bill, for the mesne profits and costs in ejectment, after judgment by default against the casual ejector.

Middlesex, ss. **JAMES THORNE** complains of *William Goodhall*, being in the custody of the marshal of the *Marshalsea* of our sovereign lord the king, before the king himself, for that the said *William*, on the twenty-sixth day of *March*, in the eleventh year of the reign of his present majesty [the day on which the ejectment was laid] with force and arms, broke and entered one shop, one parlour, and one cellar, part and parcel of a certain messuage or dwelling house, with the appurtenances, of him the said *James*, in the parish of, &c. in the said county of *Middlesex*, and then and there expelled, put out, and removed the said *James* from the possession and occupation thereof; and kept and continued the said *James* so expelled, put out, and removed, from the possession and occupation thereof for a long space of time; to wit, from thence for the space of nine months then next following; and, during all that time, had and received, to his own use, all the rents, issues, and profits of the said several premises, being of a large yearly value to wit, of the yearly value of sixteen pounds; by reason whereof the said *James* was forced and obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, the sum of twenty pounds, in and about recovering possession of his said shop, parlour, and cellar, with the appurtenances, to wit, at the parish aforesaid; and the said *William* then and there did other wrongs to the said *James*, against the peace of our said sovereign lord the king, and to the said *James* his damages of forty pounds; and therefore he brings his suit, &c.

Pledges to prosecute, { *John Doe,*
Richard Roe.

Pleas thereto; viz. 1. Not guilty; and 2. Not guilty within six years.

AND the said *William*, by *John Brown* his attorney, comes and defends the force and injury when, &c. and says that he is not guilty of the trespass above laid to his charge, in manner and form as the said *James* hath above thereof complained against him; and of this he puts himself upon the country and the said *William* doth the like. And for a further plea in this behalf, the said *William*, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *James* ought not to have his aforesaid action thereof against him; because he says that he was not guilty of the trespass aforesaid, above laid to his charge, at any time within six years

next before the day of exhibiting the bill of the said *James* against the said *William*, in the manner and form as the said *James* hath above thereof complained against him the said *William*: and this he the said *William* is ready to verify; wherefore he prays judgment if the said *James* ought to have his aforesaid action thereof against him, &c.

C. Runnington.

Replication and issue.

AND the said *James*, as to the said plea of the said *William*, by him lastly above pleaded in bar, says, that he, by reason of any thing by the said *William* in that plea alleged, ought not to be barred from having his aforesaid action thereof against him; because he saith that the said *William* was guilty of the trespass aforesaid, above laid to his charge, within four years next before the day of exhibiting the bill of the said *James* against the said *William*, in manner and form as he the said *James* hath thereof complained against him the said *William*: and this he the said *James* prays may be enquired of by the country; and the said *William* doth the like, &c.

INDEX,

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1944

THESE THINGS BEING DONE, THE LADY OF THE LADY WAS
THE FIRST TO BE SEEN IN THE LADY OF THE LADY
THE SECOND TO BE SEEN IN THE LADY OF THE LADY
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THE SEVENTH TO BE SEEN IN THE LADY OF THE LADY
THE EIGHTH TO BE SEEN IN THE LADY OF THE LADY
THE NINTH TO BE SEEN IN THE LADY OF THE LADY
THE TENTH TO BE SEEN IN THE LADY OF THE LADY

This image shows a blank, aged, cream-colored page, likely an endpaper or flyleaf of a book. The paper has a textured appearance with numerous small dark spots, possibly foxing or dirt, scattered across its surface. There are also faint, illegible markings and smudges, particularly towards the bottom right corner. The overall tone is a light beige or off-white.

1914

This image shows a blank, aged, light gray page, likely an endpaper or flyleaf of a book. The paper has a textured appearance with numerous small dark spots (foxing or dirt) and faint, illegible markings scattered across the surface. There is no text or other content on the page.

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